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## Volume 8

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

### OCTOBER TERM, 1947

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
CERTIORARI GRANTED MARCH 10, 1947

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15361 Washington, D. C.,
February 10, 1939.

15367 DR. EDWARD A. DUDDY was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

*Cross-Examination (Continued) by Mr. Leisure.*

15369 Q. Now, the farmer would not fear to sell all of his products at—take the wheat farmer, for instance—he would not fear to sell all of his products in one market, such as the Chicago market if he could.

A. You say he might not care?

Q. He would not fear to do so.

A. Oh, he would not fear to do so?

Q. He would not fear to do so.

A. Oh, no.

Q. That market opens out to the world?

A. Yes.

Q. And would that be true, Doctor, even with the little local grain elevator at his own village, or town, or hamlet?

A. Yes.

15376 Q. Now, if it is a fact that there is no inexhaustible demand for cement at any one point, would that or would that not, in your opinion, be a reason for going to additional points to find additional purchasers?

A. Yes.

Q. And some of these might be farther away?

A. Yes.

15377 Q. At any moment is there one spot price on the exchange for the purchase of wheat?

A. At any particular moment, yes.

Q. Suppose the price is a dollar a bushel at this moment on the Chicago Board of Trade. Does that mean that all wheat, regardless of its origin, would bring a dollar a bushel at this time?

15378 A. That is correct; until some new offer is made.

Q. In other words, at any given time and place does a uniform product like wheat have a uniform price?

A. Yes; it tends to.

Of course, that uniform price is arrived at by the bargaining power of buyers and sellers, each of whom may

be offering the wheat or offering to buy it or sell it at different prices, but immediately a higher price is arrived at and that fact becomes known by the price being posted, as it is, all offers come to that level.

Q. That is, when it is bought and sold in a free market, Doctor?

A. Yes.

15397 Q. The question was, Doctor, was when you have a local canning factory, such as canning cherries, and the local factory has purchased its full supply and says, "We don't want any more," the producer near that factory who sold to the factory at that time was then compelled, I am suggesting to you, to sell the rest of his crop elsewhere?

A. If you assume that condition, that would be true.

Q. And that is perfectly possible and a condition which can and does exist, isn't that true?

A. It can exist and I assume that it does exist.

Q. Yes. And, of course, it would follow, Doctor, that in that instance that this producer would receive varying nets on the sales at the different points?

A. That is true.

Q. Yes. Now in the case of these other products not sold on the commodity exchange where the producer gets varying nets, would you or would you not say that

15398 the varying nets necessarily demonstrated that there was an absence of competition in the marketing of these products?

A. No, not in that case.

15399 Q. It is true, is it not, that the marketing system and practices of an industry are, in a large part, determined by the geographical distribution of the producing areas? Isn't that a correct statement, Doctor?

A. Well, if you would add to that the geographical position of the producing areas with respect to the consuming areas, I would say that was true.

By Mr. Zimmerman:

15400 Q. I am wondering, Doctor, if the price at a market center like Chicago, for wheat, is the price that the farmer receives—the same as the price that the farmer receives at his farm?

A. Well, he doesn't receive any price at his farm, does he? If he sells at Chicago he receives the price that obtains at that point.

Q. If he sells at his farm, however, he receives the price that is less than the price at Chicago, if his farm is some distance away from Chicago, doesn't he?

A. Yes.

Q. And that difference is because of the cost of transportation from his farm, which is some distance from Chicago, to Chicago, is it not?

A. That is right.

Q. They take that into consideration, the cost of transportation, and make a certain reduction on that account?

A. Correct.

Q. Now, if the farmer offers his grain, or whatever his article may be, as you spoke of it, if he wants to shade a price he simply quotes a price to the world at less than going price and if he has got enough of that commodity so as to affect the market at all, all other sellers in the marketing area must shade their prices accordingly, is that not so; if they want to sell anything?

15401 A. The assumption you are making, to any agricultural products, is quite fantastic, that any producer has enough to affect the world price of that commodity.

Q. It is a little far-fetched, isn't it?

A. Yes.

Q. Farm products, agricultural products, are produced by so many small producers, such myriads of them, that it could hardly be compared to a produce where there are, perhaps, only 75 producers in all the country, like cement, for example?

A. That is what I thought when I read those advertisements.

Q. Yes; I quite agree with you. I think the comparison is very far-fetched.

Now, as to the matter of the farmer having some knowledge of prices; the marketing centers or exchanges might be likened to a point where all prices are filed, open prices filed so everybody may know what they are, is that not so?

A. That is largely true.

Q. And if you had an open price filed, an open price filing system where all the producers, for example, of Portland cement filed their prices, then that would, in your opinion, be somewhat likened to the situation of the grain markets where it gives the farmer, or both sides, the advantage of knowing what the prices are?

A. To the extent that it made information about
15402 those prices available, that would be so.

Q. And would that aid in competition, do you think?

A. Well, I don't want my answer to commit me to an open price filing system, as I understand that to operate, but—

Q. But we will assume, we will not commit you to that, but just tell us what your thought is.

A. Any addition to the availability of information for buyers and sellers would aid competition.

*Redirect Examination by Mr. Wooden.*

Q. Dr. Duddy, with reference to your last answer to Mr. Zimmerman's last question, also a similar question on the same point by Mr. Leisure, do you see any reason why the distribution of complete knowledge and information among buyers and sellers may not be also useful to whatever combination happens to exist in a particular field, as well as to those who want to compete?

I think he can give us his reflection on that.

A. I think it depends on the use to which this information is put.

By Mr. Wooden:

15403 Q. In other words, if there is a combination existing in the field, that information would be useful to him, as well as anyone else, would it not?

A. Yes, I think it might—might serve their purposes better than if no information existed, if they wanted to reach understandings with each other.

Q. Now, with reference to this matter of the cherry producer, and the local canner, would that ordinarily be sold on a contract with the local canner?

A. The sales to the local canner are of that nature, so far as I know.

Q. And they would specify the price?

A. Yes.

Q. Well, is there any likelihood, or necessity, that their price, that contract price, will be the price at a later time, or even at the same time, when disposed of on a non-contract basis?

A. Do you mean that the contract price will bear any

resemblance to the price at which he may sell in the open market?

Q. Yes.

A. No.

Q. Now, as I understood it, in case of wheat, the local price, at the local elevator, is based on a closing quotation of the day before, on the exchange.

15404 A. That is my experience.

Q. And that price on the exchange, as you describe it, is based upon competitive trade?

A. Yes.

Q. Among buyers and sellers?

A. Yes.

Q. So, then, the local price is the reflex of that competitively arrived-at closing quotation; is that right?

A. Yes.

Q. Now, with reference to Mr. Leisure's question about the tendency of local elevators, in buying grain, to quote uniform prices,—I believe you said there was some friction in that respect.

What did you mean by "friction"?

A. Oh, I meant that the offers of different buyers in those markets were competing for the farm's grain, they may differ fractionally even when they are all based upon the Chicago price.

Q. You mean fractionally what,—as to price?

A. As to price.

Q. You mean a fraction of a cent per bushel?

A. Yes.

Q. Or what?

A. A fraction of a cent a bushel.

Q. So, then, the prices that the local elevators

15405 may be quoting are not uniform among themselves, necessarily.

A. Not necessarily; they tend to uniformity. That is the characteristic of competition, of that price, that the so-called uniform price, which is the resultant of competitive buying and selling, fluctuates within a range, it does not immediately settle at a fixed mathematical point. Those prices fluctuate within a range, because of the imperfect knowledge of buyers and sellers, and because of variations of quality within grades, you have a friction in the market which keeps it from working in a mathematical way.

15407 Q. You spoke of the different price obtaining in different cattle markets, and that a shipper, as I understood you, might sell, or ship, some of his cattle to one market and some to another at the same time, at different prices,—is that what you meant to say?

A. I did not intend to say that. If I made that 15408 statement, it is incorrect, as far as my knowledge extends.

Q. What is the fact in that respect?

A. Well, the fact is that the shipper informs himself as best he can from his sources of information, principally now the radio, of the prices to be obtained in the various central markets, and then he ships to that market which will pay him the highest net return for his cattle.

Q. He won't take less from one market than he can get in another; is that it?

A. Not at the same time.

Q. Now, does that mean, or does that involve that the surplus production of agricultural commodities tends to move to or toward deficit areas?

Mr. Zimmerman: What kind of areas?

Mr. Wooden: Deficit?

A. That is the prevailing movement, from surplus to deficit areas, from markets of lower price to markets of higher price.

By Mr. Wooden:

Q. And would you say, with a minimum of cross-hauling, or back-hauling?

15409 A. Yes, in my studies I have found very little evidence of back-hauling, or cross-hauling of staple commodities.

15411 *Recross Examination by Mr. Zimmerman.*

Q. I wanted to be quite clear on this, Doctor. The price at the market centers, where they have exchanges, that price is always a delivered price at that center, is it not?

A. Oh, no, I would not call it a delivered price.

Q. Well, it is the delivered—

A. The delivered price has a technical meaning to me.

Q. Well, forget the technicality for a moment. It is the price of the commodity laid down at that marketing center, is it not?

A. The price at Chicago is the price of grain which is on track in the terminal—

Q. Well, that would be—

A. —the open market price of the grain.

Q. That means laid down in Chicago?

A. Yes, that's right.

15412 Q. Now, that price is not always the same as the price in Kansas City, or, for instance, at El Paso, Texas?

A. No, there is variation between the markets.

15413 BENJAMIN H. HIBBARD, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

*Direct Examination by Mr. Wooden.*

15414 I am professor of agricultural economics at the University of Wisconsin and have been there in that capacity for twenty-six years. I am one of several members of the Department of Agriculture Economics. The work of that department in which I have participated is that it undertakes to teach the principles of economics, not exclusively agriculture economics, and students usually attend courses in our immediate department and in the general department of economics. Then we have research going on all the time that is exclusively in the agri-
15415 cultural field. We also have a good deal of extension by members of the department. During the time that I have been there I have published a good many studies giving the results of research on agricultural economics. I haven't counted them, I suppose there were about seven or eight bulletins on marketing to which I gave my attention primarily the first six years I was there and I have a book on marketing agricultural products published in 1921. I have been in other lines of agricultural economics since then and I have bulletins on land economics, several on taxation and farm credit. Aside from undergraduate work, I was a graduate student at the University of Wisconsin for three years, then I went to the Iowa State College and was there a little over 10
15416 years in the Department of Economics; that was general economics, including agricultural econom-

ics. I have a Bachelor of Science Degree from the Iowa State College; Ph.D. Degree from the University of Wisconsin in the field of general economics. I lived at a farm, also farmed for myself in northwest Iowa; sold
15417 grain, live stock and such like at the local market.

Q. Do you know anything in the marketing of agricultural commodities that involves the use of basing points at point of shipment, for the purpose of calculating prices?

A. I do not.

15418 Q. Have you encountered anything in the marketing of agricultural commodities whereby the price made by one producer is conditioned upon the price made by another producer located at some other point of shipment?

A. Not conditioned upon it. He might be a competitor of a producer at another point but, typically, and usually, without any knowledge of that man, in particular.

Q. Is there anything in the marketing of agricultural products within your knowledge and experience whereby the producers of such products quote and sell only at delivered prices?

A. I know of nothing of the kind.

Q. Have you encountered any method of marketing agricultural products whereby producers will quote and sell—will refuse to quote and sell f.o.b. point of shipment?

A. No; I know of nothing of the sort.

Trial Examiner Norwood: Well, if those conditions existed, would you know about it with respect to agricultural products?

The Witness: Well, agriculture is pretty wide-
15419 spread and there might a good many things happen.

He asked if, in my experience, I have known of it, and I have known what was happening in the various territories, sometimes rather wide territories, and I have never known of it.

Q. Have you encountered practice in the marketing of agricultural commodities whereby the producers use a practice of not quoting and selling f.o.b. point of shipment?

15420 A. No.

By Mr. Wooden:

Q. Is your experience and the breadth of your inquiry

such, Doctor, as you think you would know of any such practice if it exist?

A. Well, for instance, I think that if that happened in the State of Wisconsin, which is about a 40th of the Union in agricultural operations, that I would know of it.

Also, at other times, I would have known of it in other places.

Q. Your studies haven't been confined to the State of Wisconsin; have they?

A. No; nevertheless, rather largely so, by no means confined to it.

Q. But your answer is all-inclusive so far as your knowledge and experience goes?

A. As far as my knowledge goes it is inclusive.

Q. Now, Doctor, I am going to put a somewhat lengthy question to you, assuming certain things.

15421 Assume that the methods of pricing cement are as follows:

First, that a general practice of quoting and selling only at delivered prices and refusing to quote and sell f.o.b. mill; that some mills and some groups of mills are basing points and other mills are non-basing points; that the delivered prices at given destinations are the equivalent of the base point price plus rail freight from base point to the given destination. Assume that the lowest combination of base price plus freight, rail freight, determines which base point price will govern at particular destinations. Assume that when made as described, the delivered prices of all mills become identical at the same destinations, and that non-basing point mills match the delivered prices of basing point mills at given destinations. Assume that freight, rail freight is ordinarily paid by the buyer to the railroad; that it is deducted from the face of the invoice; and that the buyer then pays the balance to the seller. Assume that the mill nets of each non-basing point mill vary between its respective customers depending on the differences in freight to their respective destinations,—differences in rail freight to their respective destinations,—substantially higher mill nets being received from its nearby customers than from its more distant customers. Assume also that when selling for delivery

15422 at destinations governed by the basing point prices of other basing point mills, the mill nets of each basing point mill also vary between its respective custom-

ers depending on the differences in freight, rail freight to their respective destinations, substantially higher mill nets being received from some customers in territory governed by it than from customers in the territory governed by other basing point mills.

Now, assume that all those things enter into the methods of pricing and quoting of cement. Is there anything in the marketing of any agricultural commodity that you know of that corresponds to what I have outlined?

Mr. Leisure: Just a moment, please. I object to that question as being incompetent, irrelevant, and immaterial, as not correctly stating the record; asking the Doctor to draw comparisons where it is not shown that he is familiar with comparisons which are sought to be drawn. There is no showing that he has ever had any experience whatever, that manufacturing industries would know what mill nets consisted of and how they might be arrived at as set out in the question.

For all these reasons, and for others too numerous to mention at the moment without having the question before me so that I can point them out, I object to
15423 the question as incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: Objection overruled.

A. I would say that you would seek in vain for a market like that within the field of agricultural products.

By Mr. Wooden:

Q. You say seek for a market like that?

A. Well, I mean a price system like that.

Q. Now, is the price of wheat of a given grade a simple identical price for any considerable time at a local country point?

A. Not exactly. It tends toward that, no doubt, but a local market does not reach the degree of perfection in which one would hope to find, knowing what it is like, or would find an identical price ruling for any length of time or even at any moment ordinarily.

Q. Is there or is there in your opinion real competition at local points for farmers' products, real price competition?

A. Ordinarily—

Mr. Leisure: Now, just a moment. Whether there is with respect to farm products, that is another case, and is not material to the issues in this case.

Trial Examiner Norwood: Read that.

15426 Trial Examiner Norwood: All of this testimony relates to statements made in the advertising, and I think he can show the truth or falsity of those.

Objection overruled.

A. I would say there is genuine competition at the local market.

By Mr. Wooden:

Q. How is it manifested?

A. It is manifested by bidding on the commodities that are brought in.

Mr. Leisure: Just a moment. My objection goes to this line of testimony, Your Honor?

Trial Examiner Norwood: Yes.

A. Yes, they make different bids. They have different judgment as to what—I remember I remarked a moment ago that the market is not sufficiently near to a perfect market as to eliminate this diverse judgment, and they will bid on the same load of grain different prices.

By Mr. Wooden:

Q. Depending on what?

A. Oh, depending on their confidence in them-

15427 selves to get it marketed in a hurry, to clean it up so that it will rise to a higher grade. They will have different optimism to the course of the market because they will have to hold this grain a little time. And there are various things. That is not the whole list. There will be different reasons why one man can think that he can see another cent a bushel in a load of wheat or barley at a local market than does his competitor.

Mr. Leisure: May I have that answer read?

(Answer read.)

By Mr. Wooden:

Q. How about sales of wheat at a given time by one wheat producer or one wheat dealer for a delivery at various points? Will he sell at one price to all points or at several prices depending on the difference in points?

A. He will undertake to sell at one point—at one price at a given point—different points, and will ordinarily do so.

Q. What is it that causes him to do that?

A. I see no reason why he should do anything different from that. He will take the highest price which is

offered, and, assuming that he does not have a vast quantity of grain that will affect market prices, he will send it to the point where he has reason to believe he will get the highest price and will not parcel it out here and there at differing prices.

15428 Q. Doctor, I am showing you Exhibit 2161-A to 2161-E, inclusive, which is the make-up of the bids of the Lehigh Portland Cement Company on State highway business of Illinois in February, March, and April, 1933, giving the bid price at a large number of destinations and also figuring out the mill nets received or receivable on those bids at each point.

I call your attention to the fact that those mill nets as figured out by the Lehigh Company for itself range from $1.01 at Quincy for delivery at Quincy, to as high as $1.58 for delivery at Virginia, Ill.; that it has other mill
15429 nets for delivery at other points ranging in between those figures; for instance, $1.35 at Albia; $1.05 at Yorkville; $1.25 at Mount Vernon.

I will ask you whether or not in the marketing of agricultural commodities you have ever seen anything corresponding to that.

Mr. Leisure: Just one moment, please.

I object to that question, if Your Honor pleases, both as to the characterizations which the Counsel used in describing the evidence, and I object further to the Doctor attempting to explain or compare his own knowledge with something that, so far as shown in the record, there is no showing he has had any familiarity with whatever.

15430 Trial Examiner Norwood: Objection sustained.

By Mr. Wooden:

Q. Doctor, if you were to encounter in the marketing of agricultural commodities a situation whereby a given producer were accepting different net returns to himself at one and the same time depending on where it was shipped, what would you say as to that situation?

15433 A. I would say it would be a very curious procedure. I am not speaking of a farmer, I am speaking of an owner of a considerable quantity of wheat or other similar products.

I would say it would be a very curious procedure for him to submit bids which would net him varying prices at

a given moment to a large number of delivery points or for a large number of delivery points. It would suggest either he owned all the wheat in the country, or something of that sort.

By Mr. Wooden:

Q. You said before that the uniform net return to a given seller of agricultural commodities at a given time was competitively determined.

A. Yes.

15437 Q. Dr. Hibbard, if you were to find in the sale of agricultural commodities a given producer taking different net returns at the same time, depending on where his product went for delivery, would you consider that to be in keeping with what you understand to be competitive processes in the marketing of agricultural products?

A. I would not; I would consider that the ordinary

15438 competitive forces have been either inhibited or suspended.

Q. Can you say why?

A. The only motive the seller has, so far as I can make out, is to get the highest net returns for his product at the time of each sale, and why he should have a series of prices for different buyers, quoted to different buyers, around at different places—I mean net prices to him—I cannot understand.

Q. Do you then consider that the real price to the seller of a commodity is the net return to himself?

15439 A. I would say the amount received is the price which he gets; the net amount.

By Mr. Wooden:

Q. Referring again to Exhibit 2161-A to 2161-E, showing the varying mill nets on the Lehigh bid to the State of Illinois at different destinations; do economists have any language or terminology which they apply to variations in net returns such as that?

A. Certainly not in connection with competitive prices in marketing.

Q. Do they have any terminology that apply to it in any connection?

A. Well, I suspect that most of them would suggest that that was a rigged market, that it was an unusual one from the standpoint of comparison with the markets that conform to the simple and long-accepted concept of a market.

Q. It has been claimed frequently that the various estimations for the delivery of cement or at which it is delivered, each constitutes a market.

15442 Q. Assuming the delivered prices of cement are made as outlined to you in my long extended question this morning, then what will you say as to the proposition that each destination is a separate market?

15443 A. I would say that the point of delivery does not constitute a market in the fullest and the usually accepted sense. It might by definition be termed the market, it is true, but my objection to it as a market without further specifications is that one price is sent out to those people, one bid, and there are no conditions. The buyer has no chance to use his buying power, his skill as a buyer. This is a take it or leave it offer, and the buyer's side of the market so far as it involves competition is at a distant point and at a meeting—I mean, the seller's. I said "buyer" I think. The seller's competition in arriving at this point among themselves, if there be several, is unknown to the buyer, but the result of it is sent to him in the form of a price which it is claimed is a competitive price. That lacks fundamentally one of the main conditions which most people understand, in my belief, a market to be.

15444 Q. Dr. Hibbard, whatever or wherever a market may be, do you consider as an economist that the presence of identical prices in that market is necessarily any evidence of competition or is it equally indicative of lack of competition?

15446 A. I would say that identity of prices might mean that competitive prices have operated to bring it to pass. Identity of prices might mean that a full or partial lack of competition was the cause of it.

15447 Q. If I informed you that cement were shipped from the point of production of one mill to the point of production of another mill at considerable distances, or even beyond, can you reconcile that with any theory of competition that you know of, as an economist?

A. Well, I would say, in general, that there is little or no occasion to ship identical products from one sur-

15448 plus area across into another surplus or selling area; that it would seem to require and virtually prove a distinct waste in shipping, if nothing else.

By Mr. Wooden:

Q. You say "if nothing else." What do you have in mind?

Mr. Leisure: If Your Honor pleases, I object to that.

Trial Examiner Norwood: Objection sustained.

Q. What conclusion would you reach from it, as an economist, as to the competitive conditions under such circumstances?

A. I would say that the competitive forces are not working fully.

Q. Now, as I understand it, in marketing agricultural commodities you don't have, except under unusual conditions, a cross-hauling or a back-hauling?

A. That is correct.

Q. Is it possible to have competition in agricultural commodities without cross-hauling?

A. Yes.

Q. Do you think it is possible to have it in other lines of industry—

15449 Q. —without cross-hauling?

A. I haven't a doubt of it.

15450 Q. Referring to this language in the first paragraph of Exhibit 2839, which is entitled "the Same Economic Law." What does that language mean to you, if anything, in connection with the testimony you have given in reply to the last several questions?

15452 Mr. Leisure: What he understands it to mean wouldn't be material in this case.

Trial Examiner Norwood: Yes, it is material as to what the public would understand the paper to be and that goes to whether or not it is deceptive.

Trial Examiner Norwood: He asked what he understands as a member of the general public.

The Witness: Well, I can tell what this para-
15453 graph meant to me when I read it some time back.

Trial Examiner Norwood: What did it mean?

The Witness: It meant that the Cement Institute wished us to understand that cement was sold at places where it was wanted and where it would sell to the best advantage and at the lowest price to the public otherwise it would be going against the friction of high freight costs, or something of the sort, and that since water won't flow up hill, this will not climb to its own damage. Therefore, it is sold under competitive circumstances.

15461 Q. Dr. Hibbard, referring to the question that I put to you on pages 15421 and 15422 stating certain assumed facts regarding the pricing of cement and referring also to Exhibit 2839, one of the advertisements of the Cement Institute that is headed "The same eco-

nomic law," and then the next words in it read: "Water will not flow up hill. Horses can run but not fly. Iron will not float." To you as an economist what is the relation, if any, between the statements in the advertisement I referred you to and the statements in the questions as I put them to you.

15462 A. On reading this advertisement several years ago, about the time it appeared, my attention was attracted to the title, "The same economic law."

Since I work in economics, I read it in order that I might interpret this title and I came to the conclusion it was the same economic law modified very distinctly in one sense and allowed free play in the other; that the analogy was like John Ruskin's analogy which he said, "Did not go on all fours."

A. The analogy was not a true analogy to me. In one instance the market is free, open and competitive;

15463 in the other there is grave doubt that that is the case.

15464 Q. Dr. Hibbard, I am showing you an exhibit in this case, No. 1112, a pamphlet issued by the Lone Star Cement Company describing its method of preparing cement, and I will read part of that for you, on page 23 of that pamphlet.

Q. The Lone Star Company says, on page 23 of this Exhibit, that "the price of its cement is made up of the following:

15465 "1. Manufacturing costs, the major parts of which are labor, fuel, and supplies over all of which we have no control;

"2. Selling cost;

"3. Packing and loading costs;

"4. Taxes and depreciation cost;

"5. Reasonable profits on our investments."

Then it says: "The total of those items equals what it terms its base price, which base price plus transportation charges would constitute the delivered price in every market if we had no competition."

15470 Q. Dr. Hibbard, do you have an opinion, as an economist, upon the question of whether a base price so arrived at as described by Lone Star, which I read you, is what economists would call a monopolistic price?

Mr. Leisure: It is the same objection; same question.

Mr. Wooden: I am asking him if he has an opinion.

Mr. Leisure: Whether he has an opinion—

Trial Examiner Norwood: Answer that "yes" or "no."

A. Yes.

By Mr. Wooden:

Q. Will you state what your opinion is?

A. Well, my opinion is this, that prices are not arrived at by counting up costs. Those are the figures that represent a price which one would hope to get in a competitive market; but prices in a competitive field are not made and promulgated as the added-up sums of specific items in costs.

By Mr. Wooden:

Q. And how about the item of profits on investment?

15471 A. Well, of course, if that were possible we wouldn't have any depressions. If it were possible to make prices by adding up costs, and adding thereto profits, then things would, I suspect, move along very well economically for every one; but prices, as I stated, are not so made.

It makes no difference whether it is cement, or products of the International Harvester Company, or the products of a farm; they are sold, if competitively, on a price which the bidders determine, and they do or they do not cover the costs.

Q. Now, Dr. Hibbard, we will come to a few specific questions on agricultural commodities.

Is the freight prepaid on wheat, when it is sold?

A. Ordinarily not.

Q. And, I believe, I asked you whether it was frequently sold at point of shipment, and if I did not, will you answer now?

A. It is not ordinarily sold at the point of shipment.

Q. Do economists have a terminology sometimes referred to as dumping?

A. Yes, sir.

Q. Would you apply that terminology to any of the conditions attending the pricing of cement, as I outlined them to you in that question appearing on pages 15421 and 15422?

15474 A. I should say that that appeared to be dumping.

Mr. Zimmerman: I see.

By Mr. Wooden:

Q. Just what appeared to be dumping?

A. Selling it at a lower price outside of their own best selling territory, and, therefore, increasing their sales by taking a lower price.

Q. Well, in the marketing of wheat, is there anything of the sort that is frequently referred to as freight absorption?

A. No.

Q. Can every seller of wheat sell in all directions from his place of business?

A. Ordinarily not, or virtually never can he do so. He sells wheat in the direction of the deficit areas, and the higher prices.

Q. Is wheat sold on what you would call a one-price system?

A. Yes, under most circumstances that is true.

Q. As an economist, is the exact matching of delivered price quotations by a number of sellers indicative to you of competition?

15475 A. I should say the mere matching of prices does not suggest genuine competition.

Trial Examiner Norwood: You refer to price competition?

The Witness: Oh, yes, indeed. Of course, I know there are many other kinds.

By Mr. Wooden:

Q. Referring to Commission's Exhibit 916-I, which is one of the advertisements of the Cement Institute, and referring particularly to the language about how cement promotes health on farms, and so on, and how it promotes the clean handling of milk and water and foods,—is it your judgment that the demand for cement on the farms is elastic or inelastic?

A. Distinctly elastic.

Q. Will you explain your answer and statement upon what that elasticity depends?

A. Well, there is a very large amount of cement used in—the making of concrete used on farms, running into a great many tons per farm, and it is a clear case that if the price could be lowered they would take a great deal more.

In other words, the demand is by no means a saturated demand, and merely saying they would take more at a

lower price is another way of saying that the demand is elastic.

Q. Referring now to Commission's Exhibit 2161-A to E, inclusive, and calling your attention to the wide
15476 variation in mill nets shown in the Lehigh Company bids in that exhibit, ranging as low as $1.01 for delivery at one point, and as high as $1.58 for delivery at another point.

Do you see in that situation any probability, speaking as an economist, wherein the price might be lowered so that the elastic demand on the farms might be increased?

A. Price already is lowered for the sake of sales, so far as mill nets go, that is, the price at the mill. If, by some means, that could be realized in the actual sale to consumers within the near and logical trade area where the price could be just as high without so much freight, I should say that it would mean furnishing more cement to more customers.

Q. Does the matter of cross-hauling have any bearing upon that situation?

A. It is a useless expense; I mean socially useless; if things could be properly arranged, it would not take place.

*Cross-Examination by Mr. Leisure.*

15477 Q. Isn't it a fact, Doctor, that most of your writings and most of your study has been confined to agricultural products rather than to manufactured articles in other industries?

A. Yes, sir; that is correct. Did you say "study"?

Q. Most of your writings.

A. Most of my writings, correct.

Q. Have you written any articles, as a matter of fact, covering the marketing of manufactured articles?

A. No.

15479 Q. So that is it or is it not a fact that your specialty has been with regard to economics that had to do with agricultural products?

A. My specialty, yes.

15481 Q. Now, as a general rule, Doctor, is it or not true that the farmer sells his wheat for delivery to the local elevator because he recognizes that that is the place where there is a demand for his wheat?

A. Well, it is the nearest and easiest market for him

to reach. Many of the larger farmers don't sell at the local market.

Q. They would sell at the central market, the big farmer?

A. Yes, they will ship carloads of grain, themselves.

Q. But all over this country of ours are there thousands of wheat farmers that sell to little local grain elevators; isn't that true?

A. Yes, virtually all of what you would call the small farmers will do so.

15482 Q. And just as when they ship to the local elevator, when the larger farmers, which you have mentioned, ship to the central market such as Chicago, are they or are they not also selling at delivered prices?

A. They are consigning the wheat, nearly always, to a commission firm. The commission firm sells in the central market, pays the freight out of the receipts, deducts that amount from the sales and remits the balance to the farmer.

Q. And as you understand that, would that be a method of selling at delivered prices in Chicago?

A. You can add the two sums together and make it appear so. I should say that they are not at all conscious of selling at delivered prices. They know that the people at the other end of the line, until you get to the consumer, must pay the freight and they sell at the price which the market affords. They do not know the term "delivered price."

Q. That is quite right, but whether they are conscious of it or not, Doctor, when you analyze it as an economist, just as the local farmer at the local grain elevator is selling at a delivered price when he hauls his wheat to the elevator, so is the larger farmer selling at a delivered price when he ships it to Chicago; is that or is that not true?

A. I suspect it is literally true, but at the local elevator the hauling is done by the farmer. That is traditional and customary. He expects to do it and doesn't

15483 stop to figure any cost. He knows the freight distance from the local elevator to Chicago or local shipping point to Chicago, and he is conscious of the fact that in getting a Chicago price he will stand the reduction of the freight, although he doesn't pay it; either logically or actually.

Q. As you have said, his commission agent pays that freight for him.

A. Out of the purchase price which he receives from the buyer.

Q. And remits the balance to the farmer.

A. That is correct.

15496 Q. Doctor, in order to leave this subject, isn't it perfectly clear to you, regardless of your interest in this case, that when you have the two grain elevators that we have described, that there will come a time dur-
15497 ing each and every day when they will be bidding the same price for the wheat? I am not talking about what might happen. I am talking about what does happen.

A. That may happen, and it probably does at times, but I would suggest that one man probably wouldn't get much wheat during quite a period when they are both bidding the same figure.

15509 Q. Now you said, did you not, that price is not based on cost?

A. I said that ordinarily, in a competitive industry, price is not directly based on cost.

Q. Now is it not a fact that with respect to agricultural products and many industrial products, if you know, that the cost cannot be determined for the purpose of using it in the determination of a price?

A. Isn't that in accordance with what I just said? That you do not add cost up in order to arrive at a price and you couldn't get the price if you did add it up, most of the time, in a competitive world.

Q. And in the agricultural products the cost would be very uncertain?

A. Yes, the costs would be somewhat uncertain, but not half so uncertain as the yield or the price.

15510 Q. So that you can be specific, I will ask you if you have this view on that subject:

"One of the most noticeable phases of the whole episode of price-fixing was the almost naive dependence on the cost-of-production theory of value on the part of those charged with the duty of naming the figures at which goods should sell. 'How much did they cost?' was all but invariably the primary question asked in the case of certain middleman margins in which the Government has concerned itself the cost was as a rule ascertainable, and,

moreover, fundamental. In the case of the production of coal, milk, wheat and live stock, it was not ascertainable; and, were it for a given time to be known just what costs were incurred, for example, in the production of each quart of milk sold on the Chicago market, it is by no means clear what the price would, or should, be. It is reported that in the case of coal the attempt to give some of the small producers a living price resulted in allowing handsome profits to larger producers. This was true also of millers; the able businessmen in that work made more money than ever before. From the standpoint of
15511 a student of theories of value, nothing could have been staged that would have borne out the views of modern economists more acceptably than the abortive attempts to base prices on cost of production, such as have been made during the past 18 months. At the same time it so happens that the prices which have best stood the test of trial in practice are those which, due to lack of time and facilities for making the necessary inquiries, were in no sense based on cost of production; as the price of wheat, which remains practically unchanged for three years and the price of coal which has been several times readjusted in order to bring out the required supply."

Does the statement I have read express your views on that subject, Doctor?

A. Mainly; measurably well.

Mr. Leisure. Thank you, Doctor.

By Mr. Zimmerman:

15512 Q. Now, in your opinion, Doctor, would the matter of competitive commodities have any bearing at all upon the pricing of any commodity; for example, if there were many, many different commodities that were competitive with wheat, would that in any way affect the pricing of wheat?

A. Most certainly.

Q. Can you tell us, from your experience as a student of our economics in America, what the commodities are that are considered competitive with Portland cement in, say, building structures?

A. I should think quite largely the rest of the general building materials such as brick and stone, lumber; they are interchangeable for a considerable part of very many buildings.

Q. Well, for example, to refresh your recollection on that, would you say that in building structures brick, clay tile, sand, lime brick, steel, structural aluminum, all fireproofing materials, structural gypsum, lime and gypsum plaster, lime and natural cement masonry mortars, limestone, granite, marble, terra cotta, lumber, composition boards, asphalt, gypsum and clay tile, copper roofing, ceramic cork, asphalt, glass block and architectural glass were all competitive commodities to cement?

15513 A. To some extent, certainly, but that is not, of course, the whole question.

Q. Well, it is my whole question at the moment, Doctor. We will ask some more in a moment.

Now, as to paving, can you tell us what the competitive articles or commodities are, as to Portland cement?

A. Black dirt, clay, gravel, brick.

15515 The Witness: I could name some more.

By Mr. Zimmerman:

Q. Go ahead.

Trial Examiner Norwood: You needn't name any more.

The Witness: All right.

Mr. Zimmerman: Well, I offer to prove that this witness—that is, I ask now the right to cross-examine this witness testing his knowledge of the Portland cement industry concerning which he has expressed opinions.

Now the witness has told me that the question of competitive commodities would have a direct bearing upon price. I am perfectly willing, if Your Honor please, in order to save time, to read into the record and to agree with Counsel, if he would prefer to have us do it that way, what the various competitive materials are.

May I do that?

Trial Examiner Norwood: Yes, sir.

Mr. Zimmerman: Yes, sir.

Mr. Wooden: I am perfectly willing to stipulate, as Mr. MacIntyre suggested, that there are all sorts of commodities that would be substituted under different conditions.

15516 Mr. Zimmerman: Now, then, as to paving, amongst other competitive products for Portland cement, there are brick, asphalt, granite, granite block, wood block, tar, petroleum, Macadam, calcium chloride,

besides those things which the Doctor has already mentioned, and others.

In matters of conservation of water and soil and use on the farm there would be brick and stone, masonry, lumber, timber, steel, cast iron, petrified pipe, segmental block, earth, and asphalt, and other commodities.

In housing, there would be lumber, glass, brick, tile, sand, lime, brick, stone, steel, composition board, asphalt siding, asphalt gypsum, clay, zinc, copper roofing, gypsum lime, and other commodities.

15517 Q. Do you know how cement bids are called for by a State Government; upon what basis they are called for?

A. Substantially so, yes.

Q. Tell us.

A. Well, they ask for sealed bids from a various number of companies specifying the delivery point, the time they want the product, and the like.

Q. And are they asked for upon the basis—you say they specify the delivery points. You mean they ask for prices at the various delivery points?

A. I think so.

15518 Q. Are you familiar with the fact that the awards are always made based upon the destination cost of cement?

A. The destination price.

Q. The destination cost of cement.

A. That is—

Q. The awards are made upon that basis.

A. Destination cost to the buyer.

Q. What it costs laid down at the point of use is the way awards are made. Is that familiar to you or is that a surprise to you?

A. No, it is not a surprise.

15519 Q. If the sale was made f.o.b. mill by all of those who were selling, would it be necessary still to know what the cost of transportation was in order to know who the lowest bidder was?

A. Yes.

Q. That is so because it would be necessary to add that transportation cost to every f.o.b. mill bid in order to know what the destination cost was; is that not so?

A. Correct.

Q. Now, if you had point "X" as the point of use

where bids were being solicited and you had five
15520 mills that were invited to bid and each one of them freight-wise located at different distances from that point "X"; suppose, for example, that No. 1 mill was located freight-wise 10 cents away from the point of use and No. 2 mill was 25 cents freight-wise away, and No. 3 mill was 40 cents away, and No. 4, 50 cents away, and No. 5 was 60 cents away; the mill that was closest to the point of use, if all of them were selling cement f.o.b. mill, all of them quoting cement f.o.b. mill at $2 a barrel, would be able to deliver its cement at the point of use at $2.15. That is apparent, isn't it?

A. Yes.

Q. Now—

A. It was $2.10.

Q. All right, $2.10. Now, the one that is further away—we will take one that is 25 cents away, could that mill sell any cement there without cutting its f.o.b. mill price so as to absorb that freight difference?

A. Well, under those circumstances, while mill A was able to fill the whole contract, I should say they could not.

Q. Then in order for the mill, any mill that was located further away than the mill that was located 10 cents freight-wise away, the other mills would have to shade their f.o.b. mill prices in order to absorb that freight difference, would they not?

A. Yes, sir.

15521 Q. Now, in order to meet the price at the destination, they would have to absorb enough of the freight, or, in other words, lower their f.o.b. mill prices so that the sum of their modified f.o.b. mill prices plus freight to the destination would be this original $2.10, wouldn't it?

A. Yes, sir.

Q. Would that, in your opinion, amount to competition, if they shaded their prices to meet the competitive price of the closest mill?

A. Is your question, would this be a competitive price?

Mr. Zimmerman: Read it.

(Question read.)

A. Not price competition.

By Mr. Zimmerman:

Q. That would not be price competition?

A. From the buyer's standpoint. It would from the seller's standpoint.

Q. That is to say, that would indicate competition between those manufacturers or mills; wouldn't it?

A. Yes.

Trial Examiner Norwood: Would it indicate price competition between those mills?

The Witness: No.

By Mr. Zimmerman:

Q. What kind of competition would it indicate, Doctor?

15522 A. It indicates a bidding at a given price in which the buyer has no advantage whatsoever in one bid as opposed to another.

Q. Now, what kind of competition would it be as between the sellers?

A. It is a—

Q. If it would not be price competition.

A. Yes. It is a struggle to maintain a price.

Q. Well, now, as to—

A. Maintain and—

Q. Stop just a moment.

A. —a delivered price.

Q. Oh, you think, then, that the mill that was located 25 cents away in cutting its f.o.b. mill price to $1.85 from $2, in order to meet the price of the mill that was only 10 cents away, would be struggling to maintain that $2.10 price; do you?

A. To maintain all the basing-point prices.

Mr. Zimmerman: Please read my question.

(Question read.)

A. It is not cutting below or offering the buyer any advantage in buying of them rather than of anybody else.

By Mr. Zimmerman:

Q. Now, Doctor, when you are ready please answer my question.

15523 A. That was my effort to give an intelligent answer.

Q. It is not necessary that your answer be intelligent. Just answer "yes" or "no."

A. I see. They are competing for business, yes. Does that answer it?

Q. It does not.

A. It does not?

Q. I want to know whether you think that would be a

struggle upon the part of the mill that cut its $2 f.o.b. mill price to $1.85 to maintain a delivered price of $2.10. Is that plain?

A. Yes. Is what?

Mr. Zimmerman: Read my question.

(Question read.)

A. No, it isn't a question. It just says, "Do they do this." Yes, they do.

By Mr. Zimmerman:

Q. Well, you do not think that would be a struggle to maintain the $2.10 delivered price, do you, Doctor?

A. They don't bid below it.

Q. Answer my question, please, "yes" or "no." Doctor, do you or do you not so consider it?

A. That is an attempt to maintain the $2.10 price.

Q. You think it is?

A. Yes.

15525 Q. Well, now, let's suppose, Doctor, the first instance where we have all the mills offering their cement f.o.b. mill at $2.00 and then you have got these freight differences, the first mill of 10 cents, and so on upward, as I supposed. Take that first example. Would any one of those mills, in your opinion constitute a basing point?

A. You mean if they were all $2.00, each, $2.00?

Q. Yes, but they are located, now, differently freight-wise from the point of use, one 10 cents, and so on, up to 60 cents?

A. And selling at a delivered price, each one of them? Is that the point?

Q. I didn't say so, Doctor. I said that their offering price to start out with was f.o.b. mill.

A. F.o.b. mill. No, I would say that that is a competitive price further than the other, and that the buyer is taking his chance on where he can find the nearest

15526 mill that will supply his needs.

Q. Now, Doctor, all of my questions have had to do with an f.o.b. mill price and differences in freight rates. You understood that, didn't you?

A. Yes, sir.

Q. Now, we will go along and say that we have got all of these five mills starting out with a $2 f.o.b. mill price, but differently located freight-wise from 10 cents up to 60 cents. If any one of those mills lowers its f.o.b.

mill price, or, in other words, absorbs freight in order to meet the lowest price at the destination, would that be price competition as between the mills?

A. So as to meet the other price?

Q. Yes, sir.

A. I would say that the competition is over in what is logically geographically the territory of another mill, and they have invaded it by absorbing a price, and in that sense there is competition for profits.

Q. Now, then, when you refer to the territory of another mill, do you mean that the mill that is located freight-wise to any point of use has any particular pre-emptive right to sell in that territory and exclude all other mills?

A. No, they have a territorial advantage and the buyers around, if they get advantage of that, would be buying at low freight cost.

15527 Q. Yes. Let's suppose a contractor in that point of use is required to bid upon a large dam project where he must bid a certain unit price on so many cubic yards of concrete to go into that dam, is it in your opinion necessary for him to know in order to make a bid what cement will cost him laid down on the job with certainty?

A. Yes, sir.

Q. Now, is it of importance, therefore, for him to know what it will cost freight-wise to bring cement into that location?

A. Yes, total cost.

Q. Now, if he buys it at the mill, he has to accept title at the mill, doesn't he?

A. Presumably.

Q. Well, you know that as a fact, don't you?

A. Oh, surely.

Q. Then he has to take the gamble on the freight?

A. Yes.

Q. And be sure that he is absolutely right on that, doesn't he?

A. Yes.

Q. However, if he has four or five mills, each one of which tells him exactly what they will charge at that destination laid down, and they are not passing titles to him until he gets it to his destination, he takes no

15528 gamble on that; does he?

A. No.

Q. Now, would you see any reason, therefore, why

that contractor would prefer to have a delivered price rather than an f.o.b. mill price?

A. Yes.

Q. You think he would?

A. Well, that depends. You wouldn't let me say anything but "Yes" or "No" for a long time.

Q. You go on ahead, now, and tell us.

A. All I would say on that is if he can get a better price instead of getting a dozen sealed bids all alike—if he can get a lower price somewhere else, he will take a real chance on the freight; and all the contractors I know would do it, too. They aren't so babyish over that.

Q. You never were in the contracting business were you?

A. Not in a large way, no.

Q. Were you ever in the contracting business where you used cement?

A. No, except at the buyer's end of the line. That was hardly contracting.

Q. Well, a contractor is a buyer at the end of the line.

A. I understand.

Q. Were you in that business?

A. No.

15529 Q. Did you ever make any particular investigation of that business in the course of your economic studies?

A. By way of reading and study of it.

Q. All right. In all of your studies have you ever run across a case where any contractor solicited bids on raw materials such as cement on any other basis than f.o.b. destination?

15530 A. Probably not, since it has been called to my attention. That is the only bid they can get.

Q. Did you ever hear of any one of them asking for any other kind of a bid?

A. Not asking for it, no.

Q. Then what reason have you got to say that that is the only way that they can get it?

A. Because it is so reported.

Q. By whom and where?

A. Oh, at Madison, Wis.

Q. What contractor ever told you that?

A. Well, I didn't make a minute of it at the time, and I don't think I had better undertake to answer that.

15533 Washington, D. C.,
February 11, 1939.

15536 BENJAMIN H. HIBBARD thereupon resumed the stand and testified further as follows:

*Cross-Examination (Continued) by Mr. Zimmerman.*

Q. In order to get the continuity, Doctor, I will try to take up from where we left off yesterday.

I notice that I asked you yesterday if, in your studies, you had ever run across a case wherein a contractor solicited bids on raw materials such as cement on any other basis than f.o.b. destination, and your answer was, "Probably not, since it has been called to my attention that is the only bid they can get."

Do you mean by that, Doctor, that you have not run across any case where, to your personal knowl-
15537 edge, a contractor solicited a bid on any basis other than f.o.b. destination for cement; where you say "probably not"?

A. I said "probably not" because my experience there is very small and I have not posed as an authority on cement or the cement contracting business, but I had picked up the supposed information that that was the way a few contractors whom I happen to know personally, get their material.

15538 Q. Well, you see, I wanted to know because I couldn't tell to what extent your other testimony might have been based upon what someone else had told you.

Now, we were talking about a situation where there was a demand for cement in a market that we referred to as market "X" and five available mills manufacturing and offering Portland cement for sale and where the nearest mill freight-wise was, as we put it, 10 cents away and the next one 25 cents away, and so on, up, each being a little further away freight-wise up to 60 cents, so that the destination cost if each of those mills were quoting an f.o.b. mill price of $2 per barrel would be that f.o.b. mill price plus the freight to the destination "X".

Now, Doctor, which one of those mills would you say was a basing-point mill?

A. Not altogether sure that those are the specifications for a basing-point mill.

Q. Well, what are your specifications for a basing-point mill?

A. Well, I think I gave that yesterday and probably stopped a little short before the full definition, which I would not undertake to give offhand any more than I would for many other concepts which are not too clearly defined. This I think is clear so far as the essence is concerned, and my understanding is that a basing-point price is
15539 a price made at some shipping point, and the mills or one or more of them would be called a basing-point mill, and that they will sell at their price plus the freight to the point of delivery. There is nothing very peculiar about that. The essence of the basing point comes out when we consider the territory of another mill which is likewise a basing-point mill, and with a point of difference or a place where the prices will balance somewhere between as would probably be the case; and, furthermore, that if the first mentioned which we will call "A"—

Q. That is the one of $2.10?

A. Well, I was thinking of it the other way around, but it probably doesn't matter.

Q. It doesn't matter.

A. So we understand. But taking it just as a hypothetical case without any figures in mind, that if the "A" mill, the first basing-point mentioned, wants to sell in the territory of basing point "B," it will make a delivered price the same as basing point "B" mill will make at that—

Q. By "delivered price" do you mean at destination cost?

A. Well, now, if you call it cost, I suppose it is cost to the buyer. I would call it the destination price. It is the selling price. And that their quoted selling price before it becomes a cost to the buyer is found by determining how much mill "B" will charge at that point
15540 and mill "A" charges the same. That I understand to be the essence of basing-point price practice.

Q. Well, let me ask you this: Suppose that any mill has a mill price sufficiently low that the sum of this price and the freight to any single delivery point such as point "X" makes a delivered price lower than that of any other

mill similarly calculated; is then such a mill a basing-point mill and their mill price a base price? Is that correct, in your opinion?

A. It seems to me it depends very much on the business practice and program of other mills. What we have in the first place is a very simple case of a sales price—

Q. Well, excuse me, Doctor. I don't want a long discussion of this. We will let you explain it later. Try, if you can, to tell me whether or not in your opinion that is a correct definition of a basing-point mill and a basing-point price, and I will be glad to have the Reporter read the question again to you.

A. I just gave you my conception of basing-point prices a moment ago.

Q. Quite so, but I am not asking for that now. I have given you a definition which I am asking you if you believe to be correct or not.

Mr. Zimmerman: Will the reporter read it?

Trial Examiner Norwood: Read it.

15541 (Question read as follows:

"Q. Well, let me ask you this: Suppose that any mill has a mill price sufficiently low that the sum of this price and the freight to any single delivery point such as point 'X' makes a delivered price lower than that of any other mill similarly calculated, is then such a mill a basing-point mill and their mill price a base price? Is that correct, in your opinion?")

A. Well, I think that is a basing-point price assuming that you are following that system in the territories of other basing-point mills, and then the essence of it comes in the hauling outside of the territory within which—

By Mr. Zimmerman:

Q. Excuse me, Doctor. I am not asking for a lecture upon this. The question is susceptible of being answered very shortly by "yes" or "no" whether that is correct or not.

Trial Examiner Norwood: Well—

Mr. Zimmerman: I should like to have the answer confined to that, and for him to give the explanation later.

Trial Examiner Norwood: Let him answer that question.

Mr. Zimmerman: He has answered and now he is going along on a discussion of it, and I object to it.

15542 Trial Examiner Norwood: I don't think so.
Complete your answer.
Mr. Wooden: He is entitled to complete the answer.
Mr. Zimmerman: I object to it, if Your Honor please.
Trial Examiner Norwood: Yes. I heard your objection. Your objection is overruled.
Mr. Zimmerman: All right. Thank you.
Trial Examiner Norwood: Complete your answer.
Mr. Zimmerman: Now, there is no question pending, so far as I am concerned. If the Examiner desires to ask a question, why, I think that might be in order.
Trial Examiner Norwood: I will ask the witness to complete his answer.
A. Well, I was merely saying that if there were but one basing point and one territory in connection with it, I think we would not have the essence of what we understand is the basing-point system in vogue but that it—

15545 By Mr. Zimmerman:
Q. Now, Doctor, let us go back to the situation where we were discussing basing points. Have you, at any time, made a study, an economic study, of basing points and basing-point prices?
A. We have studies of all degrees. I have studied the Pittsburgh plus case, various others, which I do
15546 not wish to discuss here, as a sample. I have—
15547 Q. Well, will you describe the Pittsburgh-plus system?
A. No. I said I do not care to go into another side issue of that kind and I merely gave it as a case I had studied with respect to the effects of basing points and I—

Q. Can you define the Pittsburgh-plus basing point system?
A. I can give something of it.
The argument, of course, was especially in the Chicago area, the price of steel had to be figured on the Pittsburgh price plus the freight, and I am not prepared immediately to do this this morning and had not planned to, and when the gentleman wants to know whether I made a study of this, I will say I made a considerable study of that
15548 and do not wish to be quizzed upon it.

By Mr. Zimmerman:

Q. Well, Doctor, is there any particular reason why you don't wish to be quizzed on it?

A. The same reason that I have for not going into a classroom on subjects that I knew pretty well two years before without looking at my notes or anything else and depending on my memory for a long time.

Q. Did you make a particular study of the testimony you would be expected to give here before you got on the witness stand?

A. I came here to discuss the question of prices and yesterday I was asked a great deal whether I was familiar with the manufacture of cement.

Q. You are not answering my question.

A. I am giving a general answer.

Q. I don't want a general answer, I want a specific one.

A. The answer is I studied the basing point price with respect to the general subject of price-making, and its relationship to competition in the cement sales.

Q. That is, did you read up on the subject before you got on the witness stand?

A. I have been reading up on it for a good while.

Q. What did you read?

A. I read that the prices were usually, not al-
15549 ways, but they were usually identical prices from mills of varying distances from the delivery point.

Q. And where did you read that; in what publication?

A. Oh, I read it in publications of the Federal Trade Commission.

Q. By that do you mean that you read it in the booklet called "The Price Basis Inquiry" that was published by the Trade Commission in 1933?

A. I read it in perhaps substantially—

Q. 1932; pardon me, Doctor.

A. They have more recent publications than that, and in various—

Q. For example, what, in recent publications is it you have read?

A. I think they have a bulletin dated one year later, on cement.

Q. 1933, entitled "The Cement Industry"; is that what you read?

A. I read that, too.

Q. Were those the books you read in order to prepare for your examination here?

A. No; that isn't all.

Q. What else did you read?

A. I read these advertisements of the Cement Institute.

Q. Anything else?

15550 A. I didn't make out or bring a list of all the things I have read.

Q. Have you told us everything you remember that you read in order to prepare your testimony here?

A. I would say I found corroborated there the things I have read in current literature, from time to time.

Q. Well, for instance, what current literature?

A. Oh, I read an article in the Canadian magazine; I can't give you the exact title.

Q. Can you tell us when you read it?

A. Within 10 days.

Q. You can't tell us the name of the publication?

A. I don't remember the exact title, because I am not familiar with the publication; probably have never had a copy of it before.

Q. You don't know who wrote it?

A. Yes, sir.

Q. I say, do you know who wrote it? Who did write the article?

A. John Morris Clark.

Q. And is there anything else that you have ever read?

A. Yes.

Q. Tell us.

A. I read things that are of a collateral nature, such as that of the geographical prices of wheat.

15551 Q. I am talking about cement.

A. I know but this was read in connection with it because the question was whether this would be a similar case.

Q. Who wrote that article?

A. Zappleon.

Q. Like Napoleon with a "Z", I take it?

A. Yes.

Q. Any other articles that you think of, now, that you read in order to prepare for your testimony here?

A. I remember many articles on price-making systems.

Q. Can you tell us who the authors are?

A. I can give you better the location of them and then

I can recall the titles and dates, particularly those in the publications of the American Economic Association.

Q. But you don't remember any of the authors?

A. Oh, yes.

Q. All right, tell us who they were.

A. One of them was Jacob Viner.

Q. Go ahead.

A. I can't give a catalogue of those things.

Q. That is the extent of your memory of it, is it?

A. My memory is not sufficient to give dates and titles and names. What I was interested in was the principle on which the prices were—whether they were different from what I have previously supposed or not, going
15552 on in one commodity after another.

Q. Well, did you get the impression from these things that you read to prepare for your testimony here that there were certain fixed and determined basing points in the cement industry that were published as basing points together with basing point prices, as it was in the Pittsburgh-plus?

A. There are published charts showing the basing points in the cement business.

Q. And where did you find those charts?

A. I saw several of them, probably, in the publications of the—

Q. Trade Commission?

A. —Trade Commission.

Q. And was that the basis of your understanding of the system that was used in the Portland cement industry of marketing the prices?

A. My assumption is that the publications of this Commission are reliable and that they gave what were, at the time, correct statements as to the basing point prices.

15553 Q. Were those the basis of your testimony here, those publications of the Federal Trade Commission largely?

A. Quite largely.

Q. Now, let's go back to our instance of where we got the several mills located at various points freight-wise from point "X." Would it make any difference in determining whether the mill that was $2.10 delivered cost because it was 10 cents freight-wise away and using an f.o.b. mill price of $2—quoted a price delivered of $2.10 or

quoted an f.o.b. mill price of $2 so far as the destination cost is concerned?

A. Within its own district, I should say that would be similar.

15556 Q. Well, will you tell us, Doctor, if you consider it of any importance to a community, the large percentage of the inhabitants in that community being employed in a cement mill, for a cement mill to market its production so as to keep its employees busy as many days of a year as possible, just from an economic standpoint?

A. I would say yes. I don't consider that a full answer.

Q. Now, suppose a cement mill with upwards of a thousand employes, say anywhere from 700 to 1,000 employees, and an output normally of 3 million barrels

15557 a year,—would it be of any importance, so far as the cost of manufacture is concerned, for that mill to sell a large proportion of its output continuously from year to year?

A. Yes.

Q. That would affect very directly the cost of the product, would it not?

A. The cost to the mill?

Q. Yes, the cost to the mill. We are not talking about cost to the consumer.

A. Yes.

Q. Because you would have to reach a certain minimum in production and sales in order to economically spread your various elements of cost to manufacture and overhead, would you not?

A. Yes, ordinarily that is true.

Q. And you know, do you not, Doctor, as a matter of your wide experience, that the market for a commodity like Portland cement is what we might fairly refer to as an ambulatory market? That is to say, there may be a very large demand in one locality today, which may continue for a few weeks or a few months, and then there will be a long period in that same locality when there is practically no demand?

A. I suspect that is true.

Q. For example, if there was a road-building program in a given State that might extend over a period of several weeks, or months, and then there might be no

15558 further demand of any consequence, except for replacement, that came for several years,—that is so, is it not?

A. That is, for road correction?
Q. Yes.
A. Yes.
Q. Then the same thing is true for bridges and dams and monumental works of all kinds, is it not?
A. I think so.
Q. The same thing is true so far as building projects in general are concerned? The demand is not constant at all, is it, in any locality?
A. No, probably not.
Q. Well, do you not know that?
A. I know it is true in general terms, yes.
Q. Yes.
Now, therefore, if you have a cement mill located at a fixed point, the demand for the output of that mill may sometimes be almost at its door and at other times many miles away; is that not so?
A. It is.
Q. And, therefore, when in a period of demand some distance away and a very little demand close by, that mill is faced with the problem of marketing its cement at some distance away or else closing down; is that not so?
A. I think it is.
15559 Q. And if it does close down, of course, that has a very direct economic effect upon the community, doesn't it?
A. Correct.
Q. And if it does not sell a sufficient amount of its output, it has a very direct effect upon its costs and its ability to sell at a fair price, does it not?
A. Yes.
Q. So that there would be periods if you were operating a cement mill when you would of necessity, if you wanted to keep your mill going and your men employed and your costs at any reasonable figure, when you would have to go into some territory that might lie closer freight-wise to another mill; is that not so?
A. I think so. This is not a full answer to what I understand the question to imply.
15563 Q. Now, take the example of wheat, of which you have made a special study, Doctor.
You spoke yesterday about large growers often shipping carloads of wheat to marketing centers. How many such

marketing centers, approximately, are there in the United States?

A. Well, for grain in general, there are about 12.

Q. About 12.

A. They are not all wheat markets of importance. They may be other grains.

Q. I see.

When a grower sends a car load of wheat to such a marketing center and sells it there, what is paid
15564 for it is a destination cost, is that not so?

A. Yes, sir.

Q. Now, that destination cost is really synonymous with a delivered price, is it not?

A. No, sir.

Q. Well, it does include the cost of transportation; that is, the freight from the shipping point to the marketing center, doesn't it?

A. Yes, sir.

Q. And you spoke of the instance where that freight would be paid by a commission man as the agent for the shipper?

A. I did.

Q. But it nevertheless would be included in the price for which the grain was sold, would it not?

A. It is included.

Q. Yes. Will you come back with me just a moment to our instance about the five mills being anywhere from 10 cents to 60 cents away from the marketing point and each of them selling f.o.b. mill but the destination cost being that mill price plus freight to destination; on the definition that a basing point mill is any mill whose price is mill price—that is, this f.o.b. mill price, we will talk about, now,—is sufficiently low that the sum of that price and freight to any single delivery point, such as point "X", makes the delivered price lower than that of
15565 any other mill in that territory similarly calculated, such a mill; that is, the one that has the lowest cost to the destination considering its mill price plus freight, there, is a basing point mill; under that definition the mill net was 10 cents freight-wise away would control that market and would, under that definition, be a basing point mill, is that not so?

A. Yes.

Q. Now, if the mill or any one of the mills that were further away should shade their f.o.b. mill price, we will say, as we started to yesterday; consider first this 25-cent one, the one that was 25 cents away—

A. Yes.

Q. —you suggested that it might shade its price so that the delivered cost would be $1.83; thus it would cut its mill price from $2 down to $1.83; that would make the delivered cost $2.08 or two cents lower than that mill that we decided would have been a basing point.

Would, then, the 25-cent mill become, so long as its price controlled that market, under the definition given you, a basing point mill because it controlled the price?

A. I suspect it would.

Q. And if the one next fartherest away, then, should, in its turn, shade its f.o.b. mill price so that that f.o.b. mill price plus freight to the destination made a net, we will say, of $1.82, then it, in turn, so long as it quoted
15566 the lowest price or the lowest destination cost, would be a basing point mill? I give you only the two instances because I want to just—

A. Yes, and I think that a yes or no answer doesn't cover that case.

Q. We haven't quite finished, Doctor.

A. I don't think that covers the case.

Q. So that the point that would be considered the basing point would shift around just as often as any one of those mills cut its f.o.b. mill price below all the others?

15567 A. Within its own territory.

Q. Well, we are talking about these mills being all of the mills that serve that territory, that marketing area.

A. I have—

Trial Examiner Norwood: Do you mean when freight is computed from the mill making the cut price?

Mr. Zimmerman: Yes, so that its f.o.b. mill price, plus that freight—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: —to the destination makes the lowest destination cost of all the mills that are serving that marketing area.

A. Yes.

15568 Q. All right. Let us go into that a little bit if you would like to.

Let us suppose that the mill is located at a point up there around Washington Island, we will say, up there in that area near Death's Door—you know where that country is?

15569 A. Yes.

Q. Up in the northern part of your State?

A. Yes.

Q. It is up there where it may have a fine deposit of limestone rock, that is very good for making cement—it is located up in the territory there where it is good for it to manufacture, but you wouldn't know of any particular market for its product close by it up there, would you?

A. Not a big market.

Q. No, and if it had enough of an output so that it could manufacture and sell Portland cement at a profit at all, it would have to reach out farther than that, would it not?

A. Yes.

Q. You could not very well use enough Portland cement right close about that location to justify the investment of several hundred thousand, or millions, of dollars to build a first-class modern cement plant, could you?

A. Oh, I will agree to that.

Q. All right.

Now, it could sell a little there, of course, at $2, because there would be no other mill sufficiently close that could ship it in there and sell it any cheaper when freight was taken into consideration. Now, it can't sell its entire output there, but it has got to go down around Madison and go down to Chicago in order to sell enough cement

15570 to run its mill. Now, would you think that under those circumstances that the mill if it netted $1.80 at Chicago should thereupon sell around its own door at $1.80 even though no other mill could come in there and sell at any such price?

A. If it is a competitive price I see no reason why they should charge different customers any more than the freight differential above their regular mill price.

Q. We are not discussing whether or not it is a competitive price, Doctor. We are talking about it now from the standpoint of the manufacturer and seller of cement. I am asking you if you can see any intelligent economic reason for such a manufacturer located as I have described to you cutting his price around his own door from $2 down

to $1.80 when no other mill was located close enough to him that could sell economically there considering the freight for less than $2; that there was not enough of a market for him to sell any appreciable amount of his output, and he had to sell it as far away as Chicago at $1.80. Now, why should he cut his own price around his own door to $1.80, economically speaking?

A. You want me to tell what the people up there would say?

Q. Oh, no, I am asking you now what you would say.

Trial Examiner Norwood: He is asking you.

A. Well, I suspect that from what you have stated that they would have a monopolistic price there which would enable them to charge the $2.

15571 By Mr. Zimmerman:

Q. Don't you think they should as a matter of keeping themselves in position where they could make any kind of a profit at all? Wouldn't you do it if you were manufacturing there?

A. It would depend on whether I had faith that business could be built up around there by giving them as good a price as I gave any of the rest of the customers.

Q. Knowing that territory as you must, Doctor, do you think you would have enough faith to try to encourage the growth of the community by cutting your price on a few thousand barrels of cement a year 20 cents a barrel in order to promote the growth of the community there?

A. Washington Island has a pretty good little harbor, and the freight rates on the water are lower. I think they could coax in a good deal of trade.

Q. You think that would be smart business?

A. I would think so.

Q. But that is what you would do if you were running a cement mill?

A. Well, if I believed the business around there was elastic enough, including the lower freight rates, I think I wouldn't charge them rail rates.

Q. Well, if you didn't think it was elastic enough so that you could expect in the course of time to build up a big business there, you wouldn't do it, would you?

15572 A. Taking that extreme statement of it, I think probably I would charge the $2 for my friends nearby and take less from those outside if I could get away with it.

Q. You would have about the same disposition as the farmer that you described who always wants to get the most he can for his grain; wouldn't you?

A. He sells in a competitive market.

Q. That wouldn't make any difference. What I am asking you would be what you would try to do is to get the most you could for your product; wouldn't you?

A. Ordinarily, that is true.

Q. Yes.

Now, if you found that charging a $2 price up there for cement that was used to make drain tile around the farms drove the farmers into buying tile which they could get at a lower price, you might lower your price of cement so as to get some of that business away from the tile company; mightn't you?

A. I think so.

Q. So that the price that you would charge at home would depend to some extent upon whether you could sell it or not; that is, whether or not the price was an inducement to persons to buy?

A. Yes.

Q. That is what is sometimes referred to as one
15573 phase of the law of supply and demand, isn't it, which regulates prices? Just one phase of it?

A. I suspect "demand and supply" is one of the biggest and vaguest terms I know.

Q. Well, you were talking yesterday, Doctor, about what would happen if the price of cement was lowered to farmers. You thought they might use more of it. Do you recall that period back in 1928, and the next year, how the prices of commodities including cement began to go down; do you not?

A. Yes, sir.

Q. And you know that cement got down to a point where it was selling in a good many instances below the cost of manufacture just as farm products do sometimes? Do you recall that?

A. Well, I was not informed at that time as to—

Q. You never heard about that?

A. Well, I did not know their costs.

Q. Did not you read something about what happened when you read this "price bases" inquiry?

A. Yes, sir.

Q. Do you know, Doctor, whether or not in that period

of falling prices there was an increase in the sale of cement? Did they sell more or did they sell less?

A. Well, their sales were falling off about the time the depression began which was some months before
15574 the crash of '29.

Q. Yes.

Mr. Zimmerman: Well, now, will you read my question, Mr. Reporter?

(Record read.)

By Mr. Zimmerman:

Q. Now, can you tell me that from your knowledge of what happened?

A. Well, they sold less from about that point on.

Q. The fact of the matter is that when there is a general falling off in the prices of commodities including cement there is also a falling off in demand?

A. I suspect that means that when there is a falling off in demand the prices sag.

Q. Well, it works both ways, does it not, Doctor? People don't rush to buy on a falling, declining price market, do they, in your experience?

A. There is no rush to buy or it probably wouldn't remain a falling market.

Q. What they do is when there is a sign of the market going up, the prices going up, that is when they begin to buy, isn't it?

A. I think so. That is the evidence of it.

Q. Yes.

Doctor, have you any idea what percentage of
15575 the total output of Portland cement in this country is used by farmers or has been used in any particular period of time?

A. I have never seen a figure for farmers.

Q. You haven't any idea at all as to how much they really use per annum?

A. I mentioned yesterday that the farm demand is an elastic one, that they are using most distinctly important amounts of it as can be seen by anyone who observes.

15576 Q. Well, now, the reason they do that, Doctor, is because they can buy Portland cement and utilize it for their purposes at a price which is more attractive than they can buy competitive, interchangeable commodities, is that not so?

A. That is their judgment at the time.

15577 Q. Yesterday, Doctor, I asked you about the interchangeable commodities that were sold in competition with Portland cement for road building?

15578 A. Yes, sir.

Q. Did you consider that in giving that list I gave a complete list of such competitive commodities?

A. Not necessarily, but I was much farther from it.

Q. Do you want to add to that this morning?

A. Other road building materials: Logs have been used for centuries; plan—we have many miles of plank roads in Wisconsin; hay and brush is used around marshes and sandy places.

Q. You wouldn't use those as commodities sold in competition with cement, would you?

A. I think logs and planks would compete somewhat with cement.

Q. That is, where they are so far away from cement?

A. I know where it is the case. And oil, where we oil the surface and in last night's "Washington Star" the question was asked: "Has molasses ever been used in road building?" And the reply is: "That the Imperial Institute of Sugar Technology has conducted ex-

15579 periments on converting molasses into an insoluble resinous product suitable for use as a road surfacing material."

Q. We are talking about America, now.

A. We are talking about America.

Q. Yes.

A. Well, there are substitutes that I would say are distinctly important, but no quick and easy substitute that will put wheat out of business.

Q. If the price of portland cement got to the point—there are a great many substitutes for cement, aren't there?

A. I think there are a good many.

Q. Doctor, to refer once more to the amount of cement sold in all the United States of America in a year, as to the percentage of that total, the amount that at any time has been used by farmers is rather infinitesimal, is it not?

A. May I answer that other than "yes" or "no"?

15580 Q. If you wish.

Trial Examiner Norwood: Yes.

A. It was important enough, and my attention was called to it so that a full-page ad in "Business Week" a few years ago went over quite meticulously, the importance of cement to be used on the farms.

15581 Q. Now, can you answer the question as to whether or not the amount sold to farmers has always been infinitesimal?

A. It has probably never been any greater than it is now, except very temporarily.

Trial Examiner Norwood: What is it now? Is it infinitesimal now?

The Witness: I said it is small.

By Mr. Zimmerman:

Q. But it has been growing right along?

A. It has been growing, and has power—

Trial Examiner Norwood: When you say "power" you refer to cement?

The Witness: Oh, yes—and has power of considerable growth which is socially important, which was what I undertook to state.

By Mr. Zimmerman:

Q. They do build silos out of other materials, do they not, Doctor?

A. They do, and are quite partial to the cement where the cost is not higher.

15582 Q. If, Doctor, a mill that does not have at the time when its own storage bins, or silos, are well filled with its cement which it is attempting to sell, finds that the market close at hand is not sufficient—the demand is not sufficient to absorb what it has for sale—and it goes out into other territory to sell where there are other 15583 mills located more closely to that other territory, in order to sell any cement at all it must adjust its price, whether it is f.o.b. mill or delivered price, so as to be certain that it is not higher than that which is being asked in that distant territory where it is attempting to sell,—is that not so?

A. I suspect that is so—I will say yes—but, again, that does not cover the implications of the question.

Q. That would not be dumping, would it?

A. It would be dumping.

15584 Q. That is, it would be dumping whenever in order to sell its output and to keep its mill oper-

ating it was necessary for it to reach out into a territory where there were some other mills that were located freight-wise closer to that territory, and it received there after considering the cost of transportation a net lower than it received around its own door yard? That, in your opinion, would be dumping, would it?

15585 A. It is. It would.

Trial Examiner Norwood: At any rate, that is getting rid of the surplus, isn't it?

Mr. Zimmerman: The Examiner is asking you a question.

The Witness: Did you ask me a question?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Yes, that is a special price made on what would be considered at the time a surplus.

By Mr. Zimmerman:

Q. And it makes that special price in order to meet a competitive price at the destination, does it not?

A. It does.

Q. That is, in fact, the only way that it can hope to get any business there; isn't it?

A. I wouldn't say so.

Q. How else could it get business there, Doctor?

A. By doing as the farmers and the wheat dealers do, lowering the price of cement it has to sell.

Q. In other words, it would have to lower its price, anyway, below what it was receiving net in its own door yard?

A. Yes.

Q. And that would still be dumping, wouldn't it?

A. If the lower—if it lowered its whole price

15586 for everybody?

Q. Oh, no, no, no. I am talking about lowering its price in the territory where it wanted to increase its sales.

A. That is, outside of its contiguous territory.

Q. Yes. Where it was unable to sell all of its output.

A. And is taking the difference in freight, the higher cost in freight out of its regular profits and taking the lower? I would call that dumping.

Q. Even though it cut way below its competitors in that distant market?

A. Yes, sir; or cut below them in any way.
Q. It would still be dumping, wouldn't it?
A. If it is a higher price—if they are selling at a lower price there than to what they have been their regular customers, let us assume, or anything else you want to call it—
Q. Well, now, I am not talking about regular customers.
A. Well, within its own territory, so-called, if it sells at a lower price.
Q. Close by its own mill.
A. If it sells at a lower price outside it is a type of dumping.
Q. Well, Doctor, do you understand that you can't locate a cement mill just anywhere at all?
A. Oh, I understand that.
Q. And that it must be located at a point where
15587 the raw materials of which Portland cement is made are close at hand?
A. I wouldn't question it.
15588 Doctor, where, in accordance with your idea of competition as you applied it to the wheat market, for example, in any local market, where there is true competition, does the price tend toward uniformity?
A. Where there is competition?
Q. Yes.
A. Tends toward uniformity.
Q. And it will result, eventually, where there is true competition, in uniformity?
A. In substantial uniformity.

*Redirect Examination by Mr. Wooden.*

Q. What do you mean by "substantial uniformity," Doctor?
A. I mean that it is not a set price; that is, that obtains throughout a day or any length of time but that it will be close to the same figure; right in the same cash grain market there will be different prices virtually simultaneous but it will be close together. That is what I
15589 mean by substantial uniformity.
If wheat is selling at $1.20 it doesn't mean a million bushels will change hands at the $1.20 mark, if we are talking about real wheat and not future wheat.

Q. As an economist, how do you look upon dumping with regard to what it indicates regarding competition?

A. It means that the competition is imperfect; it doesn't mean that the competition is absolutely wanting and absent, but it means that the competition is being held in check by some force or forces.

Trial Examiner Norwood: That might be held in check by tariff, or something like that.

The Witness: Yes.

Trial Examiner Norwood: I mean, the differences might come about as between the prices at home and the prices in the territory where the dumping takes place.

The Witness: Decidedly. I had in mind—I don't want to get too far afield—a very well known and important bill that never became a law, the McNary-Haugen bill was a bill which was designed to do a wholesale amount of dumping of our national products into other markets; that means to be sold there at a different price.

By Mr. Wooden:

Q. Now, Doctor, Mr. Zimmerman asked you whether mills that had the natural advantage of location in
15590 their nearby selling territory would be naturally inclined to get the most they could for their product, just like the farmer.

A. Yes, just like the farmer.

Q. Well, now, that is not my question.

A. All right.

Q. As an economist, do you consider the one method of getting the most that can be gotten for a product is to avoid competition?

A. Ordinarily, yes, competition in sales means that some one is likely to underbid, and if one can avoid the competition, chances are that he is going to get a higher price.

15591 Q. What would you say, Dr. Hibbard, if in that nearby territory where the local mill obtained its highest net returns, other mills from the outside came in there and matched that delivered price, while this
15592 nearby mill was going into the territory of those invading mills and taking substantially less at its other points of delivery?

A. I would say it was lack of competition that permits them to do it. That is, they come in and sell at the estab-

lished price at a greater cost of delivery than they were getting for whatever they could sell within their own territory.

Q. What would you say, as an economist, if, in addition to the facts that I have proposed in my question, the local or nearby mill was not running anywhere near its capacity?

A. Well, I would say that they are making less than they might, if they would sell at the lower price; they are undertaking to sell a smaller amount at a higher price,—often called, that is a higher price—often called an administered price.

Q. Suppose these other mills coming into the territory, or the nearby territory of a local mill, were likewise not—where running far below capacity.

A. I would say with an excess capacity that the business is overloaded with costs, for one thing, practicing the dumping system on one another to see if they can make a little more.

Q. Mr. Zimmerman spoke of what he called an ambulatory demand for cement, where there would be, at times, a large demand in some places and a relatively small demand in other places.

As you understand the basing-point system,
15593 does it make any distinction between the delivered prices quoted in the place of the large demand, temporary large demand, and the prices delivered in places of small, relatively small demand?

A. No distinction on that basis.

Q. What do you consider is an f.o.b. mill price?

A. A price of delivery at the mill allowing the buyer to take the product wherever he may choose and in any way he chooses.

Q. As you understand the basing-point system as outlined to you in my question on page 15421 and 15422, can the buyer of cement take possession of the cement at the mill, buy f.o.b. mill in that sense?

15594 A. Well, my understanding was that in the hypothetical question the buyer was not permitted to take possession of the cement at the mill and dispose of it as he pleased.

By Mr. Wooden:

15595 Q. Now, with reference to Mr. Zimmerman's illustration of one of those mills reducing its f.o.b.

mill price to $1.85 or $1.83, in your answer to his question regarding that, did you take into account the point of whether or not such mill making such reduction intended to make its mill a basing point?

A. That was one of the things that was not clear. I tried to ask for an explanation regarding the general offer to sell at this lower pric and if they did that and lowered the price for everybody, I would say then they had a new base price at that basing point.

Q. And in answering Mr. Zimmerman's questions regarding that, did you take into account the question or the point of whether the reduction to $1.85 was intended to be merely temporary or permanent or long-standing?

A. That was not explained. I had no way of knowing just what was meant in that respect.

15596 Q. In your opinion as an economist, does the dumping of cement, as you have described it on cross-examination, tend to increase the total consumption of cement?

A. I should say that it tends to decrease it in view of a discriminatory price in comparison with the former net prices which the mill was getting; that is, as I understand it, on the portion of it a higher price than they are getting on the portion sold nearby, I should say that that does not tend to increase, or, rather, decrease the use of cement.

15597 Trial Examiner Norwood: Not tend to decrease it?

The Witness: Tends to decrease the use of cement.

15614 Washington, D. C.,
February 14, 1939.

15615 DR. JACOB VINER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

*Direct Examination by Mr. Wooden.*

I am professor of Economics at the University of Chicago. I have been there with some intermission since 1916. During that period I have taught primarily price and distribution theory and theory of international trade
15620 and international commercial policies. My academic background and training and experience in the field of economics are that: I specialized in economics as an undergraduate and have gotten a bachelor's degree in economics, and then a master's degree and a doctor's degree at Harvard. I was special expert with the United States Tariff Commission from 1917 to 1919 and consultant expert thereafter for about a year and there I worked, in part, on the problem of dumping in international trade and the problem of price discrimination in international trade. I was, later, from 1934, to the spring of 1938, special assistant to the Secretary of the Treasury where, among other things, I worked on the problem of identical bids in contracts to the Government. I have written—published on the subject of dumping. I published a book on dumping and also a memorandum to the League of Nations and an article on dumping in the Encyclopedia of Social Science. I am this year president of the
15621 American Economic Association, but of course, I speak solely for myself and don't involve them in any way in anything I say.

Mr. Wooden: Your Honor, I tender the witness for acceptance as an expert in the field he has described.

Trial Examiner Norwood: He is so accepted.

By Mr. Wooden:

Q. Dr. Viner, did you, in the course of your economic studies and writings ever write on the subject of cement pricing?

A. I wrote a short article, I think it was in 1926, based

on a book by Willis and Byers on cement prices in which I used only the material I found in that book; discussed the price structure as indicated in that book.

Q. Now, Dr. Viner, I am going to put to you a question which will assume certain facts to exist in the pricing of cement and then I will follow it with a question.

Assume that there is a general practice in the cement industry of mills quoting and selling only at delivered prices and of refusing to quote and sell f.o.b. mill; assume that some mills and some groups or clusters of mills are basing points and that some other mills are non-basing points; assume that delivered prices are the equivalent of base point price plus rail freight from base point to destination and that the lowest combination of base price plus freight determine which base point price will govern at any particular destination; assume that when
15622 delivered prices are made as described, the delivered prices of all mills become identical at the same destination and that non-basing point mills match the delivered prices at particular destinations of the basing-point mills; assume that rail freight is ordinarily paid by the buyer to the railroad company, is then deducted from the face of the invoice and the balance paid to the seller; assume that the mill nets of each non-basing point mill vary between its respective customers depending on the differences in freight to their respective destinations, higher mill nets being received from its nearby customers than from its more distant customers; assume also that when selling for delivery at destinations governed by other basing-point mills the mill net prices of each basing-point mill also vary between its respective customers, depending on the differences in freight to their respective destinations, higher mill nets being received from customers in territory governed by it than from customers in territory governed by other basing-point mills; assume also that substantial shipments are being regularly made by basing-point mills into the territory governed by other basing points; take all those things together and then tell us whether or not in your opinion that corresponds to any sort of competitive method of pricing with which you have become familiar in your studies and experience.

Mr. Leisure: If Your Honor pleases, I want to object to the hypothetical question. It is my
15623 understanding that one of the necessary elements of a hypothetical question is that it correctly sum-

marizes the evidence already in the case. I do not think that this hypothetical question does do so, and I think it is otherwise incompetent, irrelevant, and immaterial.

Mr. Zimmerman: There is a further objection to the question, if the Examiner please.

The question assumes the existence of certain mills, or points, as fixed or determined basing points, so-called. There is no evidence in the record which proves or tends to prove or to establish any such fact. On the contrary, the evidence clearly shows that there has not been at any time, in any territory, east of the Rocky Mountains, at any rate, say in the last fifteen or twenty years, and that there is not now any one or more fixed and definite or published basing points upon which prices in the industry are, for any period of time, based or calculated.

They are based and calculated, as the evidence shows, upon changing and constantly varying conditions and factors always dependent upon the location of the spot at which the demand or market, that is to say, the destination, is located, and it can never be determined, as the evidence shows, what particular shipping point will
15624 control the price at such a destination, until there is some currently figured prices and freights that are assembled, that are applicable only for a period of time until some one or more mills may vary or change its price. It is constantly flickering.

Trial Examiner Norwood: Those figures have relation to some definite point that has mill price.

Mr. MacIntyre: If Your Honor please—

Mr. Zimmerman: Now, perhaps I may finish before we—I have not finished—and I do not want to be interrupted in the middle of my statement, except I think the Examiner always has a privilege.

Your question—did you want me to attempt to answer that?

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I think that I will ask the Reporter to read the question to me, then.

(Question of the Trial Examiner read as follows:

"Those figures have relation to some definite point that has mill price.")

Mr. Zimmerman: Now, so far as I know, that is not so. If we have a mill price, as you use it, then I assume that there would be somebody in the picture that would

be offering an f.o.b. mill price, which, according to the assumption in the question, is not so.

15625 Then there is a further and more serious objection, that the question does not touch or relate to any issue under the complaint. There isn't any paragraph in this complaint that charges the Respondents, singly or collectively, with selling on any price basis that is economically unknown to the witness, or unlike anything that this witness has experienced before, and there is nothing in the complaint that charges that there is any violation of law in any single or several Respondents selling upon a certain pricing system or basis, or method. That is not what this case is about. The charge is that there has been an agreement, or a conspiracy, and this question does not touch it.

15626 Mr. Zimmerman: Let me add this, if the Examiner please,—that, as I take it, it is not within the province of the Trade Commission to issue any order or fiat, as to how any industry shall price its commodities that it offers for sale, whether it shall sell them at delivered

15627 prices, or shall sell them f.o.b. mill. To what extent it may do that is not within the province of the Trade Commission to issue an order.

15628 Mr. Zimmerman: May I add—

Trial Examiner Norwood: The objection is overruled.

Mr. Zimmerman: —a further objection ~~that the question~~ lacks clarity.

Trial Examiner Norwood: I take it that Counsel is going to ask further questions based on these conditions, and that this is an approach to the subject.

The objection is overruled; respondents have their exceptions.

15629 A. Well, one element in that description of that, say, I suppose, hypothetical industry, is analogous to what in international trade is known as dumping; it is also analogous to reciprocal dumping where those engaged in dumping dump in common territory or go in each other's territory.

By Mr. Wooden:

Q. Will you state what part of that question presupposes that situation?

A. That part of the question which assumes that in this

industry a pricing method is followed which produces for the sellers different net prices at the point of production which differ according, and systematically accordingly in the difference of the locations of the ultimate destinations of the product. And dumping means discrimination in prices, in the net prices received by the producer, or seller. Discrimination in those prices, according to the location of the ultimate destination of the product. It is regional discrimination in that sense, and it is—I say it is analogous to dumping, it is analogous to a special form or situation where there is dumping in several directions some of which may possibly be exactly the opposite of each other, it may be inverse or reverse.

Now, the phenomena of dumping, as far as I know, as far as I think—

15631 Trial Examiner Norwood: Read that last part of that question—or can you give it to us again?

Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. Doctor, do you have that in mind now?

A. Yes.

Q. Answer it categorically, if you can, and then explain, if you wish.

A. I can't answer it "yes" or "no." It has points of resemblance to other phenomena that I am familiar with, but I don't know of any other case in which all of that semblage of detail would be duplicated.

15632 Q. Well, will you tell us the points of resemblance and the points of difference?

A. Why, the point of resemblance, with the practice of international dumping, is the following of price practices under which the net receipts at the point of production from sales vary with the location of the destination of the product. It is analogous to reciprocal dumping, in so far as there is dumping in opposite directions, simultaneously. It is analogous to regular and systematic dumping, in so far as this state of affairs continues for some period of time with some degree of stability.

15633 By Mr. Wooden:

Q. What does the presence of what you call dumping in an industry indicate to you, as an economist?

A. If the dumping is—

Mr. Leisure: One moment, if you please.

Just what that may present to the Doctor is an interesting and important economic study, but it is not material to the issues in this case and I object to it on that ground.

Trial Examiner Norwood: It may be shown to be.

Mr. Zimmerman: It is not even relevant to the issues in this case.

We are not here trying the question of whether or not Portland cement is sold upon the most approved economic basis from the viewpoint of modern economists.

Trial Examiner Norwood: We will get along faster if Counsel will just state his ground for objection without arguing it and let me rule on it.

Mr. Zimmerman: That is what I am endeavoring to do. I am endeavoring to make my objection and to state the reasons for them.

Trial Examiner Norwood: The objection is overruled. Go ahead.

A. In international trade systems my own studies have gone, or any studies of the subject that I am familiar
15634 with, the systematic practice of charging prices in one market which net at the point of product a lower yield than the prices charged in another market have occurred only when there was monopoly control at the point in the market at which the commodity was being produced; the monopoly control being either the result, possibly fortuitous, of the existence of only one producer at that point of export, or, in other cases, the result of an organization of producers with respect of prices that they shall charge.

In other countries, very often, organization being open and legal and its methods of procedure being fairly well known.

By Mr. Wooden:

Q. Dr. Viner, what is the scope of price competition in a system or method of pricing such as I outlined to you in my long question?

Mr. Leisure: I object to that also, Your Honor, as not being material to the issues in this case, or relevant.

Trial Examiner Norwood: Objection overruled.

A. In an industry following the practices such as
15635 described in that original question I would say there that the practice was one under which prices were

met according to an accepted pattern but in which each individual mill or producer participated not at all in the process of price formation or participated, if he was a leader, in a particular area, participated in the process of price formation only for that particular area and accepted prices otherwise set and interfered with them not at all in other areas.

By Mr. Wooden:

Q. What is the relation, if any, between what you referred to as dumping and the scope of price competition in an industry?

Mr. Leisure: I make the same objection. The question is much too broad.

Trial Examiner Norwood: Same ruling.

A. The practice of dumping may be a method of fighting; it may be belligerent or aggressive dumping and, normally, is so, in international trade, if there is dumping in both directions, as occurs in that industry as described in your original question, but your original question pictures an industry in which reciprocal dumping is peaceful in the sense that there is no desire to break the price by one seller of the other, but there is merely a matching of price and that, as far as I know, has no parallel in international trade.

15636 By Mr. Wooden:

Q. You spoke of "belligerent dumping." Will you explain what you mean by that?

A. There may be belligerent dumping with the intention of retaliating against an invasion of a market at dumping or other prices which are of concern to the belligerent dumping or there may be belligerent dumping with the aim of destroying another industry in order to establish monopoly control or a fuller degree of monopoly control in that market.

Q. If a basing point mill with a number of mills at different points and having base prices at a number of different points were to establish a base price at the mill of a competitor where it itself had no mill, what would you say as to that as to whether it came within the definition of belligerent dumping as you spoke of it?

A. It might very well do so.

A. I understand by the setting of a base price the making of quotations to buyers in a particular area so that if

those buyers were to compare, regardless of their lo-
15637 cation, the quotations made to them and compare the freight rates, they would find there is a common calculating point from which all these prices are quoted.

By Mr. Wooden:

Q. Is there any relation?

A. I haven't answered this other question.

Q. Pardon me.

The Witness: Would you mind repeating the question?

The Reporter: "Q. If a basing point mill with a number of mills at different points and having base prices at a number of different points were to establish a base price at the mill of a competitor where it itself—"

15638 Trial Examiner Norwood: I am asking the witness to answer the question that has just been read.

A. I would reply to that question that the establishment of a basing point at a point at which the establisher has no mill would facilitate the practice of belligerent dumping by enabling that mill to lower his price for, let me say, destructive purposes in a particular area without involving any change in the prices he charges in other areas.

By Mr. Wooden:

Q. In your mind is there any relationship between the subject of dumping and cross-hauling or cross-freighting?

15639 A. The practice of cross-freights or of two producers selling in each others markets if the commodity is bulky so that freight costs are important is inconceivable except as a fortuitous or sporadic phenomenon unless there is the practice of charging different net at the mill prices on the part of both of those producers and that price practice must be as systematic or as regular as is the phenomenon of cross-freights in order that the latter shall be able to occur.

By Mr. Wooden:

Q. Do you mean to confine your answers to these various questions to the subject of price competition, or do you take in any broader field of competition than price competition?

15640 A. Well, the competitive impulses of businessmen show themselves in many ways.

One of the ways, and the way which is chiefly beneficial

to the national economy is the method of price competition but there are other methods of competition than price competition.

Q. Have your answers so far been confined to the matter of price competition?

A. Well, they have related both to price competition and to the avoidance of it.

Q. But you haven't gone into other forms of competition in any of your answers?

A. No.

Q. Do you recognize that there might be competition in other respects than as to price?

A. Yes. There can be competition with respect to sales effort, including advertising.

There can be competition through servicing which doesn't appear in the formal price, although it may—to me as an economist I would make an adjustment for any differences that have advantage to the consumer and call them price advantages or price disadvantages.

Q. If the theory should be advaneed that the system or method of pricing cement that I outlined in my long question is a method or system of meeting competition,

15641 what would you say as to that?

A. I would say that if the term "meeting competition" is supposed to be synonymous with a method of price competition, I would say "no." I would say it is a system of matching prices so as to avoid competition and that in a system of that sort I would interpret a price practice of that sort as intended to avoid price competition rather than as a routine carrying out of the forces of competition.

15642 Q. If the theory were advanced that identity of price is evidence of the existence of price competition, what would your statement as an economist be on that?

A. I would first—

15643 A. I would say that absolute identity, absolute and complete identity is a phenomenon which

15644 could never spontaneously arise from individual activity. That under the fullest and freest of competition there would be a very strong tendency for approximating of prices, in a certain sense; it would be a tendency always at work and probably always strong enough to prevent marked deviation, but the complete

identity or uniformity of prices is a phenomenon, if it exists, it seems to me, which always reflects managed competition, in some sense.

The identity of price which is approximated under full price competition would be an identity of the prices received by a producer at his mill or point of production without regard to the location or the color of hair or complexion of the purchaser.

By Mr. Wooden:

Q. In that sense do you see any identity of price in the method of pricing cement that was outlined in my long question?

A. Well, there is there outlined a system under which there is identity of delivered price to buyers at any particular locality, but that kind of identity, if it is not absolute, if it is not absolutely uniform and continuous for any stretch of time, that sort of identity would result from most kinds of price systems including overt and monopolistic systems.

Q. Suppose you had a case where a base price
15645 at one figure were in effect on one side of a State line and a different base price in effect immediately on the other side of the State line and both of those base prices being put into effect by one base mill and recognized and observed and followed by its competitors.

What competitive theory exists on which that could be explained?

A. That sort of a pattern would demonstrate to me that there was an understanding of some sort in that industry that a leader was to be followed with respect to price in a certain area and that whether there was competition or not, the competition, if it did exist, should not take the form of price competition in that area.

15646 By Mr. Wooden:

Q. What would you say if a condition existed whereby the base price of mills in one area differed over a long period of time with the base price of mills in the next adjoining area by a uniform amount per barrel?

Mr. Leisure: I—

A. Would you read that question?

Mr. Wooden: I can—

Trial Examiner Norwood: Read the question to the witness.

(Last question read by Reporter.)

The Witness: Does "uniform" there mean constant?

By Mr. Wooden:

Q. Yes, over a long period of time.

A. Yes.

Q. I can clarify the question, if you are not clear.

A. I understand it.

Q. Do you understand?

A. All right.

15647 Trial Examiner Norwood: Well, I will overrule the objection; let him answer.

A. I would say that if both base prices were effective during that period of time in the sense that sales were actually being made throughout that period of time at both base prices, or their equivalent, when freight was added to them, that that would be a rigidity which would be inconsistent with the existence of active price competition between the producers in those two areas.

By Mr. Wooden:

Q. Now, more specifically, assume that over a long period of time the base price at the mills in the Hudson Valley are 10 cents a barrel higher than the base price of the mills in the Lehigh Valley, the next-adjoining

15648 basing-point area,—is your answer the same?

A. The mills—does the 10-cent constant differential apply through a period of time?

Q. Yes.

A. Well, as there are a number of mills in the Hudson Valley and a number of mills in the Lehigh Valley, that again would be a rigidity which would be inconsistent, in my judgment, wholly inconsistent with the existence of active and genuine price competition, either within these two areas or as between them.

Q. Let us assume that in submitting bids on very large quantities of cement, running a million barrels or more, to State highway commissions, that there is a very high degree of identity in the delivered prices quoted at a large number of the destinations, say, every county in the State; can you reconcile that situation, or such a situation, with the existence of genuine price competition?

A. I cannot.

Q. Will you say why?

A. That sort of situation clearly demonstrates the existence of a pattern of behavior with respect to quotations, and that one element in the pattern is that of meeting a leader's price rather than attempting to establish a price, or rather than attempting to get volume through lowering the price, and, moreover, the ability to quote identical price is itself quite an accomplishment, if the prices
15649 were moving in response to changes in supply and demand as a genuinely competitive price does, because it would then involve difficulties in finding out, almost momentarily, just what was the price being quoted by all other producers who might conceivably bid on that project.

So that that sort of situation indicates to me that there is both an accepted pattern with respect to price behavior of a sort which eliminates ordinary types of price competition, and, secondly, that there is machinery of some sort for making known to the operators in the industry just what is the last minute price of every other operator in a relevant part of a United States area.

15651 Q. Dr. Viner, you said something in your last answer regarding the necessity of mills having to know at the last minute what the delivered prices of other mills would be in order to make their delivered prices at many destinations on sealed bids the same. Is that, in your opinion, feasible through getting information in the field through salesmen at each destination?

A. It seems to me that unless the price were al-
15652 most absolutely rigid so it never changed, or almost never changed at any particular basing point or unless there was an elaborate information-gathering machinery and there were sales on quotations on which reports could be gotten by competing producers almost hourly, in every locality, the success of the bidder in presenting identical bids for a great number of locations at the same time would certainly strongly indicate that they had more means of discovering their competitors' prices than were apparent on the surface.

15654 Q. Dr. Viner, I am showing you Commission's Exhibit 1185-C and D, a list of basing-point prices furnished by the Lone Star Company in June, 1938, and which gives the base prices in effect during the period running from January 1, 1933, to the date the information was furnished (showing exhibit to witness).

I call your attention to the fact that in that list the Birmingham, Ala., base price has been $2.15 ever since July 7, 1933; I call your attention also to the fact that the Hudson, N. Y., base price has been $2.15 ever since July 11, 1933; also that the Lehigh Valley Pennsylvania base price had been $2.05—I take it that is cloth—ever since July 11, 1933; I call your attention to the fact that Pittsburgh, Pa., base price had been $2.05 ever since July 11, 1933.

Q. As an economist, what would you say as to what such long continued base-point price levels means with reference to whether or not competition is active in such an industry?

15655 A. I would say that that evidence would show, if the evidence were accurate it would show that there has been during that period no price competition either between mills located at different basing points, in so far as those mills cited are concerned, nor within—a particular basing-point area where there are a number of mills, that active price competition means a moving price which moves in response to changes in demand and supply, and straight lines, uniformity, absolute uniformity, absolute constancy, cannot result from a spontaneous activity of a large number of individuals acting as individuals.

By Mr. Wooden:

Q. Suppose I call your attention to the fact that that Lehigh Valley price which did not change over that long period stated—and as shown by the exhibit—was a base price recognized by a group of mills of 19 or 20 mills,

15656 located in the Lehigh Valley,—what, if any, difference would that make in your answer?

A. What does "recognized" mean there?

Q. I would say recognized and observed in their prices.

A. If there were eighteen or twenty, did you say?

Q. Yes.

A. Eighteen or twenty mills located within that same shipping region?

Q. Yes.

A. Located at or about that same base point,—well, the fact that there was a constant unchanging price throughout a substantial period of time would convince me, absolutely—to me it would be an absolute demonstration that during that period there was not going on active price

competition, or any kind of price competition, between the mills located at that point.

Q. Suppose there were four or five mills in the Hudson Valley, and I believe I showed you that the Hudson Valley base had not changed over a period of several years; would your answer be the same to that?

A. Exactly the same.

Q. And as to the Pittsburgh area, with four or five or six mills?

A. Exactly the same answer.

Q. And how about Birmingham, with four or five mills?

15657 A. Exactly the same answer.

Q. What would your answer be if there were two mills at a point that had a base-point price, that did not change over a period of years?

A. My answer would be exactly the same, that that would be evidence that there was not price competition between those two mills.

Q. What is the economic role of basing-points in the price structure, such as I outlined in my long question?

A. In a situation such as described in that opening question, where the essential characteristics were commodities bulky, so that freight costs were important, and produced at a substantial number of different locations, and with a fairly substantial number of producers, you could not avoid price competition without simplifying the situation from the point of view of those who wished to avoid price competition by establishing or obtaining the establishment of some kind of a price pattern, and the only significance to me of the base-point system, not of its economic consequences, but of the objectives of the reason why it is retained or would have been established in a hypothetical industry like this, would be that it facilitates the establishment of a policy of pricing so that leaders are easily recognized, and their leadership can be accepted, so that there will be meeting of prices, matching of price, but no genuine price competition, except through that
15658 action through shifts in relative base prices, shifts of one base-point price's relation to one another, but to eliminate all other kinds of price competition, and, as I say, the function, from an industrial point of view, on base-point system, in such a case, is to meet the situation

where a postage-stamp situation is impossible, because the commodity is so bulky that it is not feasible,—and yet not to have as many prices as there are points of production, and to have a regular pattern known to the industry so that the task of maintaining leadership shall not be beyond the industry's powers.

15659 Q. The long question to which I referred appears on pages 15621 and 15622 of the record made up since the question was asked.

15663 Q. Dr. Viner, would it be proper, in your opinion, or accurate, in your opinion, to claim that under this system or method of pricing cement that I described in my long question, each mill is merely selling at the lowest destination price.

A. If the contention were presented to me that each mill sold at the lowest delivered price at any point at which cement was offered by any mill, I would say that from your description of the hypothetical industry no other alternative was conceivable, given the rest of the hypothesis, provided buyers are free, legally and otherwise, phy-

15664 sically free to choose what cement mill they shall buy from; then in quality of delivery price at a particular locality is essential for all who are to participate and actually make the sales in that area, and that selling at the lowest price prevailing, on that theory, in such a case is also selling at the lowest price prevailing in that area, because there is only one price, a matched price, a leader's price.

By Mr. Wooden:

Q. In your opinion, could the method or system of pricing cement outlined in my long question, arise spontaneously as the result of competitive forces?

A. Not fully, not to the extent outlined in that hypothetical question, not operating regularly, and operating in a stable fashion over time. It would have to be—certain of its elements would have to be planned. I do not think it would—it seems to me—that no particular element there which would be absolutely essential, some substitutes could be found, but some elements would have to be planned in order to have all of the conditions necessary to the operation of a price structure such as that, and there would have to be maintenance of it. In the light of the history of industries, it seems to me there would have to

be even some disciplinary machinery, some means whereby there could be enforcement of maintenance of the pattern so that there would have to be some arrangement both for its organization and for its maintenance.

15665 Mr. Zimmerman: Now I move to strike out of the answer the conclusions of the witness such as are illustrated by "it seems to me that there would have to be some disciplinary machinery maintained."

That is an expression of opinion that involves invading the province of the Examiner and the Commission on determining a question of fact under the charge set forth in paragraph 4 of the Complaint.

The charge is, here, that there is an agreement; that is the deliberate charge made in paragraph 4 of the Complaint; to employ and by the actual employment of the methods and practices set forth in paragraphs 5 to 7, inclusive, it is not proper for the witness to volunteer or to state his conclusions on such questions of fact.

Trial Examiner Norwood: Isn't this pure induction?

Mr. Zimmerman: Sir?

Trial Examiner Norwood: Isn't this pure induction?

Mr. Zimmerman: Yes, I think so.

Mr. Wooden: Pure opinion.

Mr. Zimmerman: Very entertaining but not proper.

If we were having a round-table discussion, here, I should find it most interesting, but that is all it amounts to.

Trial Examiner Norwood: The objection is overruled.

15666 Q. In your opinion, Doctor Viner, would such a disciplinary agency or agent, instrument, be provided by the installation or the potential installation of a base point price by an outside mill at the mill of a competitor?

A. I can answer that either affirmatively or negatively only by changing the "would" to the "could."

I would say I don't know how to answer the question "would the establishment of a basing point at a point where the mill operator had no mill, would it serve as a disciplinary tool," but I would say with confidence that it could be made to serve as a disciplinary tool.

15667 Q. Will you explain just wherein it could be made to serve such a purpose?

A. If one mill or a group of mills objected—I mean objected in the sense of felt objections to—the base price es-

tablished by another mill as being too low and wished to exercise pressure on that mill to raise its base point price or to stop violating the base point prices of other mills, this other mill or group of mills could conceivably exercise the pressure by lowering their own base point price but that would involve them in loss of price to customers nearby in which the other mill wasn't at all interested and would exert pressure as well as result in reduction of price to customers which were in the area which the other mill cultivated. By establishing a new basing point for itself while maintaining the original one it could locate its price-cutting against the mill which it wished to discipline rather than spread over all its sales, to financial loss to itself.

15668 Dr. Viner: Your Honor, I wish I would be permitted to correct some testimony I gave this morning in connection with my qualifications.

Trial Examiner Norwood: Certainly.

Dr. Viner: I was not quite accurate.

(Referring to official record): Lines 11 to 14 on page 15620, I said there that I was later, from 1934 to the spring of 1937 special assistant to the Secretary of the Treasury, where, among other things, I worked on the problem of identical bids in contracts to the Government.

I should correct that by saying that I was from 1934 to the spring of 1938, with intermissions, in the Treasury Department for part of the time as special assistant to the Secretary of the Treasury, and for part of the time as a consultant—economic advisor.

15672 (Question read as follows:

"Q. Dr. Viner, I am showing you Commission's Exhibit 1112, which is a booklet issued by the Lone Star Cement Company, one of the Respondents in the case, and on page 23, of which booklet, they describe how their base prices are made up, as follows:

" '1. Manufacturing cost, the major parts of which are labor, fuel, and supplies, over all of which we have no control;

" '2. Selling cost;

" '3. Packing and loading costs;

" '4. Taxes and depreciation costs;

" '5. Reasonable profits on our investments.'

"Then they say: 'The total of these items equals what we term our base price which—plus transportation charges

—would constitute the delivered price in every mar-
15673 ket if we had no competition.'

"I will ask you whether, in your opinion as an economist, that a base price so arrived at is what you would call a competitive price or a monopolistic price?")

A. I would have to answer it in terms of this statement here, as I understand it, which is that they calculate a base price by a certain procedure.

That if they had no competition they would charge that base price everywhere. As they have competition in certain areas from other base points, they don't charge that base price plus delivered freight everywhere but they actually quote that price in their own area.

"The price we actually quote any cement buyer is influenced by two factors:

"First—our 'base price,' plus the freight charge from our mill to the customer's town."

At the base point the base price is zero, so they quote the base price at the base point.

Mr. Leisure: That is not the question.

He is reading from the exhibit.

Trial Examiner Norwood: I think he has explained it.

The Witness: I am trying to explain what question I am answering.

15674 A. In the first place only one firm at a time can establish a price at which it can make sales on this basis at one point because it would be miraculous if two mills both following that practice were to reach exactly the same results whereas we know that where the buyer is free to choose as between the seller at the same point there cannot persist substantial differences in price delivered by the different producers actually selling at that point so
15675 that if that is the practice of this firm and if there are other firms located at the same point then that firm must be the leader; the others must be following a different kind of practice and that must be the one in accepting the leadership of that firm, in accepting the price, which is not a form of competition.

Q. Let us assume, Dr. Viner, that the Lone Star Company who thus described its method of building up its base price, has a mill in the Lehigh Valley, and that there are some 18 or other mills also in the Lehigh Valley; what would your answer be, taking those additional facts into consideration, in connection with that statement?

A. Well, I would say, again, that that would mean, if that statement were correct, were accurate, as to what actually occurs at that point, that would mean that the Lone Star sets the price for that area, and that the other mills are following another practice, a practice other than
15676 that of the Lone Star; that the Lone Star is following the practice of price leading, and the others are following the practice of price following, and that that, I may say, is not my understanding of a price competitive practice.

Q. What is the economic definition of the word "price"?

A. Well, in general, I think the definition, as an economist gives it, when he does not have in mind some particular issue, is likely to be very ambiguous, and he is likely to make it a price received by a seller for a commodity sold by him.

Q. Do you consider that ambiguous?

A. I think it is ambiguous because it does not indicate—there is always a good deal implied. It is the price received by him. The commodity has to be defined, and the commodity can be defined as a commodity at the mill, as the commodity delivered. In order to make it a usable definition in a concrete instance you have to provide additional information.

Q. Suppose an industry in which the commodity is sold only at delivered prices, and in which the buyer pays the freight to the railroad company, and deducts that from the face of the invoice, and pays the balance to the seller? What is the price in that case?

Mr. Leisure: If Your Honor please, I think that question calls for a legal definition term. Courts have always undertaken to say what price is in those circumstances.

Trial Examiner Norwood: He is calling for an
15677 economic definition there.

I shall instruct the witness—

Mr. Leisure: It is a conclusion of law which I do not think should be put on the shoulders of this witness.

Mr. Wooden: An economic judgment.

Trial Examiner Norwood: I think he is giving this as an economist, what he considers it.

The objection is overruled.

A. I don't know—I don't know how to answer that question. I don't,—as I say, the term "price" as used by the economist is ambiguous, unless further qualified.

By Mr. Wooden:

Q. And I did not sufficiently qualify it for you?

A. Well, if you ask me what is the price, then I would say there is a mill net price there, and there is a delivered price, or that is a delivery equivalent of a mill net price.

Trial Examiner Norwood: Could there be a—

A. (Continuing.) There may be a wholesale price, and a retail price, a price on a cash basis, and a price on terms.

Trial Examiner Norwood: Could there be a difference in the price that the seller receives and the price that the buyer pays?

The Witness: There certainly can. If there is a broker between, or if there is a distance between, and the
15678 buyer gets it delivered, and the seller sells it undelivered.

Trial Examiner Norwood: Well, suppose certain expenses were incorporated between.

The Witness: Well, if there are certain—it depends upon the conditions of sale. A seller can sell at his mill, or he can sell delivered, or he can sell in either way, as is usual, I think—as I think, I know, as is usually, at the option of the buyer, and he would quote different prices according to the conditions and terms of sale.

They would all be prices, it seems to me.

By Mr. Wooden:

Q. When you have used the word "price" or "prices" in connection with your analysis of dumping and discrimination, what was the sense in which you used the word "price"?

15679 A. I, of course, do not recall every way in which I may ever have used the term "price." I hope when I did use it, I used it in such qualification as to make it clear in what sense I used it at the time.

By Mr. Wooden:

Q. Well, what was the sense in which you used it in discussing, or analyzing, the question of dumping and price discrimination?

A. For the analysis of price, regional price discrimination, I think there is only one usable definition of price, and that is price with reference to the cost—a price at which a buyer can get it at the mill or point of production.

15681 Q. Referring to your statement this morning about belligerent dumpings or disciplinary measures,—if it should appear that there are a limited number of large concerns, each with a number of mills, located at different points on the map, and that the collective capacity of those mills constituted a very substantial percentage of the total capacity,—in your mind would
15682 there be any relation between that condition and the disciplinary measure, or belligerent dumping, that you spoke of?

A. Well, of itself it would not prove anything with respect to the existence of belligerent or punitive dumping; but it would facilitate its exercise at a lessened cost to the belligerent dumper, if such there should be.

Q. What is your opinion as to the adequacy or sufficiency of such a possibility upon mills who might be inclined toward independence in action regarding prices?

15683 A. Well, it seems to me quite clear that a reasonably intelligent producer would be less likely to embark on the practice of under-cutting the base point prices of other producers if these other producers are relatively few and strong, and by having local mills can localize their own punitive dumping as a means of chastising him; but I must confess that I cannot judge as to how much less willing it would make an individual producer to engage in it. Simply, it would be, that the hazards of it would be increased above what they would be under a different situation.

15685 The Witness: May I amend my answer? Is that permissible?

Trial Examiner Norwood: Certainly.

A. I would say that if the producer were sane.

Trial Examiner Norwood: How about "normal"?

The Witness: I would say if the producer had been a producer and his directors weren't at the time trying to get rid of him. If he were accepted in his job as being normal I would regard a situation of this sort as being more hazardous than another situation.

Q. Dr. Viner, can you point out any differences or resemblances between the pricing system or method in cement as outlined in my long question, to competitive price structures as you know them?

15687 The Witness: I may be misinterpreting the question. I understand the question to be what are the differences and the resemblances of cement price structure as outlined in that original hypothetical question and the price structure as it would be in a fully competitive cement industry.

15688 By Mr. Wooden:

Q. The question is, as you understood it, Doctor, and I want you to tell us what the point of difference and resemblance there may be between the pricing of cement as outlined in my long question on pages 15621 and 15622 to what you would consider a competitive price structure.

Trial Examiner Norwood: Go ahead.

A. I see only one point of resemblance to a competitive price structure and that is that at any one point different buyers will find that they can buy the product at the same price or approximately, as it would be in the case of complete competition and at any one point the sellers deliver it at a uniform price to all sellers at that point. That is the point of resemblance, the uniformity of delivered price with the qualification under competition that would be approximate or close, whereas in the absence of price competition it may be absolutely uniform. The uniformity may be perfect. The differences as between competitive price structure—

15689 A. The differences as between a price structure as outlined in that original question and a fully competitive price structure are first that regularly and systematically sales are being made at prices to yield different nets to the seller from points at which there are more than one seller; that there is a fairly regular or regular, in the question, a continuing and constant differential in net mill prices for producers at certain points according to the location of the seller, and that—

By Mr. Wooden:

Q. Location of the seller?

A. Of the buyer—pardon me—according to the location of the buyer and also that there is this practice, as I recall it defined in the question, the practice of following a leader of meeting prices as distinguished from the situation in a fully competitive market where every seller in degree makes some contribution all the time to the

formation of price and doesn't merely accept, passively, an existing price.

Q. You spoke of a point of resemblance at the outset, that being the fact that destination prices at given destinations might be the same or approximately the same. Did you take into account in that answer—

A. Did you say destination prices at different destinations or at the same destination?

Trial Examiner Norwood: Same destinations.

By Mr. Wooden:

15690 Q. At given destinations.

A. All right; I see.

Q. Did you take into account in that statement the fact that the mills or points of shipment might be located at varying freight-wise costs from the given destination?

A. Yes.

Q. All right.

Now, Dr. Viner, what are the effects, in your opinion, on the national economy of the method or system of pricing cement that was outlined in my long question on pages 15621 and 15622?

Mr. Zimmerman: I have, first, to object to that question on the ground that it is not an issue under the complaint in this case, and, secondly, that the original question is not based upon the evidence in this case.

There is not, in this case, evidence which tends to show that sales are made in this industry only on the basis of delivered prices and a refusal to quote and sell f.o.b. mill.

15691 On the contrary the evidence tends to show that not only the particular Respondent which I represent, Marquette Cement Manufacturing Company, has continually and over a period of many years sold on f.o.b. mill prices where there was a request for them, but that many other, a very large number of the other mills have consistently done likewise.

Now to assume in the question facts which do not exist in the record and which are not in accordance with the evidence and then ask for the effect upon the national economy is wrong, fundamentally, and, secondly, we must have a question that is within the confines of the complaint which is based clearly upon the question of agreed prices.

I mean by that a combination, a conspiracy, which is not in the situation here at all and is not touched by it.

The question here is not one of whether the Commission may find that a circumstance of marketing, which the evidence shows, has grown up over a period of 30 years or more could be improved so as to be economically
15692 sounder from the viewpoint of certain economists.
15694 Mr. Zimmerman: May I just add this, if the Examiner please, that I did not intend by specifying the objection, the single objection, as to inaccuracy with reference to f.o.b. mill to waive any other objections to the question as to its not being accurate as to the testimony in the record.

There were other points but I did not desire to bring them out.

Trial Examiner Norwood: Answer the question.

By Mr. Wooden:

Q. Do you want it read?

A. I think I recall the question.

If an industry were operating in the manner described in that original question it would involve, first, a waste, an economic waste to the national economy in terms of cross-freighting; it would involve an economic waste to the community because through acceptance of price leadership it would generalize the competitive impulses of businessmen into cost-raising types of competition which do nobody any good, as distinguished from price-reducing forms of competition which at least do the consumer good and may benefit the economy as a whole.

Q. What kind of cost-raising types of competition do you refer to?

A. I refer to restraining competition, to com-
15695 petition in selling effort, in the form of salesmen and advertising and the number of outlets and so forth which raise the cost of the product without giving to the consumer a better commodity or one whose greater part to him is a tolerant proportion to the increased expense on the selling effort. Also the increased cost of what, from a national point of view, is excessive and unnecessary freight hauling; also a system of that sort would be costly to the economy because it would facilitate the maintenance of rigid prices and rigid prices are an important factor, a very important factor, in explaining

the slowness of recovery from a depression and the intensity of a depression when it does occur.

It would also involve, in all probability, a higher cost to the consumer not necessarily because the industry would be trying to exploit the consumer, but because in the long run these wasteful costs would have to be borne by someone and would tend to be borne by the consumer, in part, if not wholely. They might be borne in part by the industry itself in the form of unprofitable operations.

Also a system of that sort which provides an umbrella for the badly located plant and the high cost of the plant would lessen the penalties in prospect before an entrepreneur in badly locating his plant or designing it. He would still have the incentive to have his plant located as well as possible, but he would know he is in an
15696 industry which wouldn't immediately oust him if he failed to exercise good judgment in handling the situation.

In a fully competitive industry you have to meet the price prevailing in the market which is set by the lowest cost to which all that output, that market, could take, at that price, could produce, and if your cost is in excess of that you may last a while while you are wearing out your plant, but you can't maintain the plant or reproduce it when it is worn out and you will be ousted in time.

Q. Does the method and system of pricing outlined in that same question, which I have asked you several times, have any effect upon the producing capacity of the industry?

A. Well, in the same way that a situation of that sort in which there is an active price competition lessens the penalty to an individual businessman of making a mistake with respect to location of his plant, or making a mistake with respect to the design of his plant. In the same way it lessens the penalty to him of making a mistake with reference to the size of his plant, and thus may lead to excess capacity.

Q. Well, aside from the size of a plant, what about the number of plants?

A. Well, in the same way, that is really covered by mistakes, that the penalties toward economic mistakes are, I would say, less severe, or tend to be less severe
15697 under this sort of a system, with the result that he is more likely to make them, as discipline enforced

by a freely competitive price market. And an entrance and departure from an industry is, such as in a freely competitive economy, where the rest of the economy is also competitive, as would tend to establish the right number of producers and the right size of producers.

Under this sort of a system, that is not at all the case. It would be a coincidence if it arises, and, in fact, you would expect the normal situation in an industry in which there is no, or very little, price competition, to be an industry normally characterized by plants operating only at a fraction of capacity, maybe a large fraction, but I do not mean by that 10 or 20 per cent, but with a substantial amount of idle plant, not only in idle seasons, but even in busy seasons, and with a willingness to establish plants, also, in a place where there are enough plants to meet the demand likely to arise at the prevailing price.

15698 Q. What would be the effects on producers, or members of an industry, such as agriculture, assuming the price of their products when sold to be competitively arrived at, if and when they buy the products of other industries at prices that are not competitively determined?

15699 A. In a system in which industry A—which I do not need to name for my purposes—an industry A operates on the basis of fully flexible and competitive prices, and finds itself in an economy in which many other industries to which it is related either as a purchaser of its products or an industry to which it sells it own products operates in the sense of price competition, and, most important, of price flexibility, that so-called price
15700 competition works very badly. Everything works badly except for a very skillfully managed monopoly that may be able to insulate for itself all its advantages of control over price and not share some of its disadvantages.

Very often I think it is not true that the monopoly suffers with his victim, but it seems to me that the heart of the American problem, economic problem, is the fact that it is an economy which is not half slave and half free, but the economy in which a part of it is still operating, and, perforce, operates on the basis of flexible competitive prices, and faces in all directions other parts of the economy which operates on the basis of rigid prices.

Out of that comes losses, mal-adjustments, the steepening and lengthening of depressions, and out of which, in turn, comes, I think, most of our economic troubles, the entrepeneur watching this in the terms of instructor on the economy, if the existence may be taken for granted of a large section of the economy which does not operate on the basis of competitive price practices, it is of major consequence to the economy that something be done about it.

By Mr. Wooden:

Q. You refer to industries that perforce operated on a competitive basis. What did you have in mind?

A. Well, I think that since the beginning of business no business remains on a competitive basis with respect
15701 to price if it knows how to get out of it, and remains within itself only to the extent that it does not know a method of escape. Now, the fewer number of producers the easier it is to devise a police method of escape from it. There may be industries, such as agriculture, where the number of producers are so great that without governmental intervention they cannot possibly establish a monopolistic or rigid basis for their operations, except for a few specialized commodities where really the number of operators are not very numerous. I will not specify a special product, but let us say a fruit, produced in one valley, and where the number of producers are relatively few. So that I think the attempt to escape from price competition is part of the psychology of the normal business man, and he does not like the impact of price competition upon himself. He would like to be free to practice it on others, and, therefore, that part of the industry in which the number of producers is relatively few has probably pretty generally escaped quite extensively from the necessity, the forced necessity upon him, the involuntary recourse, to price competition; whereas, there is another part of industry which has not the means of escape from it.

That is what I meant when I said "perforce," that some part of industry cannot, as a practical matter, organize itself so as to escape price competition. It would like to, as any other part would, but it is not practically
15702 possible for it.

Q. What is your opinion, as an economist, as to the relative evils in a pricing method such as outlined to you in my long question on pages 15621 and 22, and the method of pricing such as would be initiated by a complete monopoly of ownership of the units?

A. Why, if this hypothetical industry were under
15703 complete and unified monopoly control, it is certain that they would not, of their own accord, establish such a price structure as they now have; a price structure as we now have in the cement industry cannot be explained in terms of delivery choice from among available alternatives, from among a wide range of available alternatives without fear of legal interference, because it obviously has disadvantages, very serious disadvantages to the industry itself.

Now, those disadvantages to the industry are at least from my point of view advantages of economy. I include industry in the economy—national economy. This tendency which would exist in such an industry for a large wasteful expenditure on sales efforts, selling a standard commodity, the cross-freights, and an industry under single control would obviously reduce the amount of selling efforts and would obviously eliminate—maybe in fortuitous and casual circumstances—mistakes of shipping clerks, that would eliminate cross-hauls, cross-freights.

Now, I don't—I don't know how—in thinking about the structure, I have not been able to see how you could design any worse one, from the point of view of national economy, assuming you have free choice.

15705 *Cross-Examination by Mr. Leisure.*

15712 Q. Doctor, to determine the price of an article is it necessary to know first what article you are talking about?

A. Absolutely.

Q. Is it necessary to know the quality of the goods?

A. I want to be sure I am answering your question as you intend it to be put.

Q. If you don't understand—

A. I assume by determining the price of a commodity you mean, for instance, if I were collecting price quotations for a price series by the Department of Labor?

Q. Yes, or giving testimony such as you have given here today with respect to articles.

A. So if I said the price of two articles were the same, what did I mean by the two articles?

Q. Yes.

A. If I were to say two commodities had the same price

when sold by two persons, I would want them to be homogeneous commodities with respect to location, quality, packing, and terms of sale and all other significant conditions affecting sale.

Q. Exactly. Is it also necessary to know the amount of goods that are offered at a particular price?

A. Yes. If there are quantity discounts, that
15713 would be relevant.

Q. And do you consider—

A. I would include that under terms of conditions of sale.

Q. What I had in mind, Doctor, with reference to place of sale: If you were asked to draw a comparison it might not be possible to draw a comparison between the price in San Francisco and one in New York, without specifically specifying?

A. For me as an economist a commodity offered for sale in San Francisco is a different commodity from one offered for sale in New York.

Q. Would you need also to know something about whether there is a cash discount and how much it is?

A. Yes.

Q. And would the credit terms be of any interest to you?

A. Yes.

Q. In other words, Doctor, in order to under-
15714 stand the measure of price must one consider all the goods and services given in exchange for money?

A. One must make proper allowance for them, yes.

Q. Price, then, as I understand your answer, has a large number of elements?

A. That is right.

15716 Q. Do you regard all dumping as harmful, Doctor?

A. I would say that dumping would never be part of my optimum situation; most desired. It might be lesser, a resort to dumping might be the lesser of two evils provided it were dumping in one direction and not cross-dumping, but the virtue I see in dumping sometimes is that it
15717 means that a concern which has a strangle hold over its home market can't sell abroad except by a competitive price, and, therefore, has no object, competitively, in the outside market.

I don't mind that part of dumping which means a higher

price at home but I don't mean a price over somebody who is in monopolistic control.

15720 Q. Doctor, did you also, previously writing on the subject of dumping, make the following statement:

"From the point of view of the exporting country, the preponderance of opinion appears to be, and I believe rightly, that resorting to dumping is frequently economically profitable not only to the dumpers but to the country as a whole."

Did you make that statement, Doctor?

A. If it is there, I made it, I—

Q. I now show you—

A. You can see I cannot recall, but I take it—I mean I do not dispute that I made it.

Q. Yes.

A. Nor do I dispute the statements, I think it is—

Q. (Showing paper to witness) I now show you Respondent's Exhibit 101, Doctor, and direct your attention to 101-C, and again ask you whether or not you made the statement I have just read to you?

A. Yes, I think I made that statement.

15721 Q. Then, I suppose you would agree that dump-
15722 ing is therefore a form of competition?

A. Yes.

15737 Q. All right. Then, take the case of a farmer
15738 who after selling all of the milk that he can to a local creamery, ships the rest to a more distant market at a lower net return than on his local sale, would you call this dumping?

A. I would call it the domestic analogue of dumping. There is a question of whether dumping is properly applied in domestic trade, but economically I would call it the domestic analogue of dumping.

15742 Washington, D. C.,
February 15, 1939.

15744 DR. JACOB VINER thereupon resumed the stand and testified further as follows:

*Cross Examination by Mr. Leisure* (*Continued*)

Q. Dr. Viner, yesterday we were discussing prices.

I would like to ask you this question with respect to price: Suppose a manufacturer reduced his price below his base price, plus freight, at a point very near his own mill, in order to get an order in a particular market, would you regard that as price competition?

A. The other place was very near his mill?

Q. Yes.

A. But was it in an area controlled by another mill?

Q. No, it is near his own mill, and not controlled by another mill.

A. Not controlled by any other mill?

Q. Yes.

A. And he reduced his mill net price in his own area for one point in that area?

Q. Well, I am not suggesting that he reduced his mill net. I am suggesting that he wanted to make a particular sale at a particular point, and he reduced the price

15745 there in order to get that sale,—in order to make that sale.

A. Well, I just want to understand the question. He maintains his base point price, at the base point, but at a point not far distant from which he offers to sell at his price delivered, which when the freight is taken out of it would produce a mill net less than the base point price,—is that your question?

Q. Well, will you state your question again, please?

A. All right. This is—as I understand your question, before I proceed with this answer,—that a base point mill wants to get an order in a certain part of its controlled market, which it otherwise would not get, or might not get, and, therefore, lowers the delivered price at that point to such a level that when you take the freight out of it it would produce a mill net less than his base point price?

Q. That is my question.
A. Yes.
Q. Would you call that price competition?
A. I would call that price competition.
Q. And, as you have already pointed out, that, of course, would result in obtaining a different mill net from this sale than from other sales, would it not?
A. That's right.
Q. Doctor, would you expect prices in a competitive market to change very frequently?
15746 A. I would expect the frequency of change to correspond very closely to the degree of competitiveness in the industry, so that the more competitive the industry was the more frequent I would expect to find price changes.
Q. And it would be—you could measure the competitive condition by the frequency of the price changes?
A. Well, I would expect to find a general correlation. I would not expect to find it a perfect one, because the flexibility of price is not used solely to the question—
Q. But could you measure it, in that way, though?
A. As a rough measure, yes, I would say it is one rule used to say whether an industry is competitive, but to make my answer not misleading I should point out that a very competitive industry may, nevertheless, have prices which do not on a close examination reflect rate flexibility if the commodity is extremely bulky like, say, sand and gravel, and if a large part of the price therefor is necessarily freight costs, and if the freight costs are rigid there I would measure the difference between the freight and the price.
Q. Following along what you have just said, do you find, in fact, that prices change frequently through the day in the sale of most manufactured goods?
A. Frequently through the day?
Q. Yes.
A. I would say on the contrary.
15747 Q. Now, on most manufactured goods, you would not—from what you have said you would not expect them to change every day?
A. I would not expect them to change every day, but if they were competitive I would expect them to change frequently. I do not regard frequently there with respect to price to mean a number of times per day.

Q. Now, won't you just define what you mean by "frequently"?

A. Well, I would say that if I found that on examining the books of a manufacturer, and examining his invoices, if I found that his price did not change for a commodity produced currently, not a seasonal commodity, if his price did not change twice a year, I would say that that is—

Q. You would not call that frequently?

A. I certainly would not.

Q. But it is a fact, is it not, in most industries, that the prices do not change from day to day?

A. I cannot verify that fact from my own knowledge. I know that prices are much more variable than they seem from the ordinary published lists of prices, that list prices are much more rigid than the actual prices charged to customers, and then I know from examination that some of them, for instance, the series as published by the Bureau of Labor Statistics exaggerate the rigidity in the price structure, because they use competition on prices where the volume is small, and so on—the list prices are made in effective prices then, but I could not tell you

15748 whether that is something—that is the sort of information that can be obtained only by somebody's intensive field work.

15749 Q. Now, as you have used the term, there, what would you call frequent changes?

A. Well, I would say a price that doesn't change at least twice a month would be suspect, to me. I mean the industry would be suspect; of not operating under complete competition.

Q. Now look at industries of manufactured articles where the prices do change twice a month.

A. I think I have already said I would not state how the prices of any industry behaved unless I had done field works on it or knew the product of other reliable field workers. Actual prices are the scareest of information; actual prices are largely secret, they are not available to the outside student, ordinarily.

Q. If it should appear that the majority of industries in this country do not change as often as twice a month, would you still fell you would suspect all industry in this country as not being competitive?

A. Completely competitive.

Q. Will you define, then, Doctor, what you mean by the term "completely competitive"?

A. The word "competitive" to me includes all the activities of rival businessmen intended to promote their profits that impinge upon other businessmen in the same industry.

That includes competition in sales effort and it in-
15750 cludes competition in advertising; it includes competition through price reduction.

Now industries may be highly competitive. They may be in cut-throat competition and yet may not be engaged in price competition and two competing dumpers in the same territory or two reciprocal dumpers dumping in each other's territories may be killing each other off; they are highly competitive but not with respect to price, necessarily, so that competition includes a wide range of activities and when I say that an industry is not completely competitive, I mean with reference to price competition because that is not the only, but almost the only competitive aspect of businessmen which is, in my opinion, serviceable to the community.

Q. Would you say that in these markets that you have been discussing that there is no price competition?

A. There may be some. It would not be complete. It may be very sluggish; it may be occasional; it is not regular and active and systematic if the price changes are of rare occurrence or of infrequent occurrence.

Remember, I also qualified it that it may be a seasonal industry. Then it would be the behavior at the time they quoted, that I have in mind, that the orders would be taken.

Q. If price changes are rare occurrences would you say that is any test or criterion as to whether or not
15751 there was an absence of price competition?

A. I would say it is a very important criterion.

Q. As to that would you say that there are degrees of price competition?

A. Yes, very much so.

Q. What do you mean by that?

A. Why, there may be—an industry may resort or slide into competition because of a great pressure for volume when there is a slump in the market so that an industry for periods as long as 18 months or two years or two and

a half years keeps on selling at the same price or pattern of prices and then the slump comes and there is pressure on the individual members and they break their code and there is price-cutting and their discipline is broken down or the pressure to get volume has over-ridden their code or their usual pattern of behavior.

That is a question of degree with respect to how frequently they compete.

There may be also a question of degree to the extent to which they will lower a price. They may feel it is indecent to lower it very much below the level, the prevailing level, or there may be price competition that is concealed where they may improve the quality slightly but maintain a nominally equal price.

Q. Then, Doctor, does price competition always
15752 cease, in your opinion, when the prices become identical?

A. If the prices—that is not sufficient information.

I would say identical with respect—I think earlier in my testimony I distinguished between identity of delivered price at the same point and I said that an approximation of that existed under competition and a complete uniformity as to that might exist under monopoly so that approximate identity of price to buyers at the same point is consistent with complete competition; also with complete monopoly.

Q. Then you would not say that the mere identity of price is evidence of the lack of competition, price competition?

A. It would depend on the pattern of identity, the kind of identity, whether I accepted it as—

Q. It would depend on a great many other factors, wouldn't it, Doctor?

A. Not many others, no.

Q. What are they, then?

15753 A. It would depend on the relationship, the pattern of delivered price to the location of producers and their pattern of mill nets.

Q. Couldn't you have identity of price without having delivered prices?

A. You mean have identity of delivered prices?

Q. No; couldn't you have identity of price without having delivered price considered at all?

A. The prices we were talking about were the prices at the same point to different buyers. There are different kinds of identity of prices depending on which aspect of price you are looking at and I thought we were talking about identity of delivered price at the same point.

Q. Take identity of delivered prices at the same point and the question I would like for you to answer is whether or not you consider that price competition always ceases when they become identical?

A. If they were absolutely identical; I mean if their uniformity were a hundred percent complete—

Q. Just as absolutely and definite and certain as you could make it.

A. I would say price competition would be non-existent, or very partial.

15755 Q. You stated that you think that the conditions outlined in the long hypothetical question asked by Mr. Wooden result only from some kind of management or understanding. When, if ever, would you expect a manufacturer whose plant is not fully employed, to reduce his price in order to increase his business?

A. If he were in a fully competitive industry he would have no choice.

The nature of the competitive market would force him to lower his price as long as the price, after being
15756 lowered, was still in excess of what economists call his marginal cost in addition to his aggregate cost with the additional units involved in that sale.

Q. With that situation would you expect manufacturers at neighboring mills to respond by cutting their prices in order to maintain their business?

A. If they were not already working at what was a comfortable capacity under the existing situation for them; yes.

Q. Then if that situation arose as we have described would you expect the first manufacturer to cut his price further in order to increase his business?

A. I would expect him to keep on cutting his price and to have no alternative, under full competition, as long as the additional unit of sale would bring him more revenue than it would involve him in expense.

Q. That would be the inevitable result, wouldn't it, Doctor, from what you have said?

A. Of complete competition.

Q. And would such a series of price cuts result in what is commonly known as a price war, in your opinion?

A. If that industry operating in this competitive manner were surrounded by other industries which operated in another manner, competition of that sort would be—your term was "price war"?

Q. Yes.

15757 A. Yes, it would be price war, it would be cutthroat competition, yes.

Q. With the series of episodes which you have just outlined, Doctor, the possible circumstances, would you expect a rational business man, pursuing his own interests

15758 and having, in the past, experienced this kind of price reduction leading to price wars, to embark upon price reductions likely to have such a result?

A. No, sir; I would not.

15762 Q. What information would you need to have to know whether or not when you have one man selling in the market at $2, and another in the market selling at 2.20—what additional information would you need to know in order to determine whether or not the man selling at $2 was engaging in price competition?

A. Well, take if I knew one man was selling in the market for $2, and another at $2.20, I would suspect there was not competition in that market, because I could not explain continuance of two different prices in the same market if there was real competition.

15775 "Q. If a manufacturer, Doctor, should set out to meet secret price cuts, where he found them, would this produce varying mill nets?"

A. It depends on whether he met them secretly or openly. The answer to your next question is whether he met them secretly or openly.

Q. I was merely addressing my attention to when he met those prices, whether or not it would produce varying mill nets, and I think we have agreed that it would.

A. Yes.

15776 Q. Now, in discussing the subject with Mr. Wooden, you spoke of market leadership. Is it not a fact that such leadership is a very common phenomenon in industry?

A. I understand that it is, in the manufacturing industry.

15779 Q. You do not think that marketing policies could be followed if found effective in one manufacturing company,—if found to its advantage, you do not think those could be followed by another manufacturer, do you, without collusion or agreement?

A. The other manufacturers could learn from the experience of that manufacturer, but in the absence of agreement or collusion they would have to make their own adaptations to their own situations; so that the result would never be an identical copying. Identical copying is never good.

Q. When any one follows a leader, does one take the precise length of inches in a step that the leader is taking, in anything?

A. In some things. In that hypothetical question on which I am basing my reply, the hypothesis was that they do.

Q. Now, I am not talking about the hypothetical question, Doctor, at all at the moment. I am talking about price leadership, and as to whether or not you can have leadership with respect to marketing policies, and a hundred other things in a manufacturing industry. As I understand your testimony you cannot in the absence of collusion?

A. That is certainly my general opinion, that you cannot have effective leadership in price policy or—

Q. What do you mean by "effective leadership"?

15780 A. Well, so that—if you trace the record over a few years, that pattern would be exactly conformable to what you would expect—to what you would have a right to expect if you knew that each producer in the industry felt obliged, for one reason or another, to set the price, set by this leader and change it only and and after that leader had changed it.

Trial Examiner Norwood: Don't you think that leadership might also be established by coercion and "coercive methods"?

The Witness: Well, if the person coerced agrees or submits to the collusion, I would use the word agreement to cover that, the agreement. You may be an involuntary partner to an agreement under threat of something worse.

Trial Examiner Norwood: Yes.

The Witness: I did not mean that it was not necessarily

a spontaneous rushing into the agreement; that might be a case where they were coerced into it.

Trial Examiner Norwood: That would include fear of retaliation.

The Witness: In fear of punishment. That punishment might take a number of forms.

By Mr. Leisure:

15781 Take the case I just gave, where one manufacturer cut the price and the others followed, is it or is it not a fact that leadership is frequently because of identical prices in industry?

15782 A. I think it is frequently the cause of identical prices, yes.

Q. You are in favor of something else. What are you in favor of abolishing, the leader or the follower?

A. The leader—I am in favor of abolishing leadership as the principle of formation of price, which means 15783 I favor the abolishing both of the leader and follower,—the leader and follower.

Q. And what substitution, Doctor, would you provide?

A. Well, I—I am not—I do not feel—I think that the problem is a very definite social problem. I do not feel confident that I know exactly the right solution. I take an experimental point of view toward it. My only feeling is that certain phases of the present price structure are having and will have disastrous consequences, and they must be ended. As to the form of amendment, I believe that increased degrees of setting the pattern by Government, of price structure, will be necessary, and I say it with misgivings because I think the odds are pretty nearly as good that the Government will be stopped—will make mistakes and will set a vicious pattern, but I think a pattern in some industries has to be set. I think if you leave it to business men they will set a bad pattern, from the point of view of economy. I am afraid if you leave it to Government it will also set a bad pattern.

Q. Doctor, coming back to Mr. Wooden's hypothetical question as of yesterday: In interpreting that question, would you think it important, in judging an industry using such methods, to ascertain whether or not there was a very large amount of secret price cutting?

A. To me a price that is cut secretly is just as much a

price as if cut openly, and if there is a lot of secret
15784 price cutting in any industry—you would not—and there was flexibility in the prices so cut, I would call that an industry of flexible prices, and the competition would be competition to me even though done secretly. I would regret the secrecy, it would lead to abuses, and discrimination between persons, but I would still regard it as competitive practice.

15790 Q. If you had no competition in an industry there would be no cross-hauling, of course, would there?

A. No competition with respect to any—

Q. I am just taking the converse of what you say.

A. That is right; a complete monopolist who had sense would eliminate cross-hauling.

15791 Q. And have you given us any industries in America where complete and perfect competition exists, Doctor?

A. I would say it doesn't exist probably anywhere, now, for any important industry because where it would otherwise exist the Government is preventing it from operating in a fully competitive way but it would exist in large parts of agriculture; it would exist, I think, in—some of mining; it would exist in certain forms of transportation, if the Government permitted it to.

15796 Q. You don't know what studies have been made in certain industries and not made in others, with respect to that, do you, Doctor?

A. You mean with respect to the preference of cross-hauling?

Q. Yes.

A. No.

Q. Would you or would you not expect to find it in any indutries that sell on a delivered price basis?

A. I would expect to find it in any industries which sell on delivered price basis and which have market areas having boundaries at which their delivered prices are
15797 equal to delivered prices of some other mills elsewhere located and who, nevertheless, solicits business outside their market area.

15804 Q. Now would the elimination of cross-hauling in your opinion mean more competition or less competition?

A. I think it would mean more price competition and less sales competition.

Q. It would mean more price competition?

A. More price competition.

Q. And would it mean more sales competition?

A. I think it would mean less sales competition, in the form of advertising and number of salesmen and sales efforts in general.

15805 Q. Yes. Now, suppose, Doctor, an industry should suddenly eliminate cross-hauling without any governmental compulsion. Would it indicate to you that in and of itself any kind of agreement or collusion or understanding?

A. Yes, it would.

15809 Q. Did you make the following statement, Doctor, in writing in the Journal of Political Economy at page 107 of Volume 33—page 107 to 111: "According to the author the data they present showed the changes in cement prices occurred with somewhat the same frequency as do the prices of other standardized commodities thus meeting the test of competitive prices that are quickly responsive to change in market conditions. This is a good test, perhaps the best single test, of the competitive character of prices."

Did you make that statement?

A. May I see the passage—I—if that is—I cannot understand—

Q. I refer you—first I will ask to have this page marked for identification.

Trial Examiner Norwood: Respondent's Exhibit 102.

Mr. Leisure: Page 3 of the Journal of Political Economy, article written by Jacob Viner, in a review of the Willis and Byers' book.

15812 Q. Suppose you just take your time and glance through the whole article.

A. If you permit—

Q. And then tell the Examiner whether or not you wrote these statements that I—

A. If you permit me to do that.

Q. Incidentally, did you need to look through the whole article, Doctor, in order to tell whether you wrote that paragraph?

A. Well, I don't—I am willing to take it on faith. I

have not—I have no reason to suspect you have done anything to the text of the article, so if this is presented as a transcript of my articles, on the strength of that, and no other evidence, on the strength that you are presenting it to me, I will say that I wrote it.

Q. Now, would you or would you not expect to find a substantial degree of price uniformity at any point for any standardized commodity, doctor?

A. Would you repeat that question, please? I think I have it.

Mr. Leisure: Read the question.

(Last question read.)

15813 A. Uniformity with respect to place or time, or seller or buyer? Would you like me to answer in terms of all of those?

A. Well, I still say a variety of patterns of uniformity, I would expect to find a substantial degree of uniformity of price with respect, for instance, to the prices that different buyers located at the same points are paying at the same time.

By Mr. Leisure:

Q. Did you, Doctor, in the Journal of Political Economy, in the same volume, the same article, at pages 107 to 111, make the following statement:

"Since, however, a substantial degree of such uniformity may be expressed for any standardized commodity, whether it is competitive or under monopoly control, its existence may be taken for granted."

Did you make that statement?

A. I cannot recall. I would not unless I knew what the word "such" meant there.

Q. I—

A. But, if you tell me I made it, I will accept it.

15814 Q. It is in the article.

A. Then I made it.

Q. Now, take a heavy industry, or use, for example, cement, where producers of cement are scattered geographically, so that each producer is protected geographically in his own immediate vicinity by the cost of transportation from the nearest other producer. Would you or would you not say that the differing mill nets of a producer could be consistent with the absence of agreement between producers?

A. Those are single producers at one point? Yes? I mean, that was your question? There was one producer at one point, another producer at another point?

Q. Yes. Would you or would you not say that the differing mill nets of the producer would be consistent with the absence of agreement between the producers?

A. Yes, would be consistent with the absence of agreement, yes.

Q. In other words, that conforms with your previous writings, Doctor, in which you stated, did you not:

"The continued existence of differentials in f. o. b. mill prices to producers according to the location of the purchasers could be consistent with the absence of any agreement or understanding between producers only if the producers were all scattered geographically so that each
producer was protected in his own immediate vicin-
15815 ity by the cost of transportation thereon from the
nearest other producer."

A. I would accept that proposition as expressing my views today.

Q. Will you describe for us just what you meant by "fully competitive" method of selling? What are its requisites?

A. Well, its appearance would be that of a movement downward of price at any time when orders were flowing
in less rapidly than the capacity of the—the com-
15816 fortable capacity of the plants of the producers to
meet them, and the movement up of price, whenever orders were coming in at a quantity such as to press the capacity of the plant at the existing price, the requisites of the existence of such a state of affairs would be the existence of a substantial number of producers so that what anyone—of substantial coordinate importance or unimportance—so that what one individual producer should do would not be a matter of substantial concern to any other producer in the industry, and so that this group should behave as individuals rather than in a concerted fashion through arrangement.

Q. Would you say that those are all of the requisites needed for the existence of complete competition, Doctor?

A. I think so.

Q. Now, again, will you list for us all of the industries that use what you call a fully competitive method of selling?

A. You mean I should list the industries in the United States which do so?

Q. Yes.

A. I cannot list them.

I would say the ones that I could easily list a few years ago no longer operate on that basis, because the Government does not let them or invites them not to.

Q. Well, can you list any of them, Doctor, or would you say that there are none.

15817 A. I would say there are very nearly none at the present moment. I won't vouch for there not being one. I would say that wheat is still very near—wheat growing—very near a fully competitive industry, but I would not say that it is quite that, because of Government interferences. And so with oats, and barley, rye, and hay, although hay may be. I don't think that hay is under any sort of control, but you would have to hunt for them, I will say that. You will have to hunt for them, they are not easy to find now.

15818 Q. Are you prepared to say, of your own knowledge, at the present time, that these are fully competitive industries?

A. My definition of fully competitive requires some rigorous and complete and painstaking knowledge that I would say if you want to meet it a hundred percent, even a very expensive governmental investigation would still produce an inconclusive answer.

Q. So, at the present time, you have not such knowledge that would enable you to say—to make such statement, as I understand it?

A. That there exists—

Q. A fully competitive industry?

A. A fully competitive industry?

Q. Yes.

A. No, there does not.

Q. That would also apply to the other one you mentioned, you mentioned sand and gravel and one other—motor industry.

A. Fully one hundred percent presently competitive—no—I don't have the knowledge to justify me in even believing that they are that.

15821 Q. Do you consider that in this instance, in matching or in meeting competition, or matching prices, as you call it, that it is an attempt to avoid price

competition, or an attempt to follow the law—which would you consider it?

A. In this case?

Q. Yes.

A. This case being which case?

Q. The case which we were just discussing, where the producer sells in the foreign territory without reducing his entire level of prices, at the price he finds there—

A. He—

Q. —he meets the price that he finds there.

A. Oh, that's a form of competition, it is a competitive —a competitive act.

15825 Q. Now, you have stated that one of the characteristics of lack of competition is the operation of plants only at a fraction of their capacity—

Mr. Leisure: Page 15697 of the record, Mr. Wooden.

Q. (Resumed) Will you list for us now the manufacturing industries, Doctor, producing homogeneous products who are operating all of their plants at full capacity?

A. I cannot—I cannot make any such list, no.

Q. Can you name any one, Doctor, of these?

A. You mean from firsthand information?

Q. Yes.

A. No, I have no information on the subject, no firsthand information on the subject.

Q. Now, you said, in substance—and if I misquote you I am sure you will correct me—you said in substance that identity of price always means a managed price.

15826 Would you explain to the Examiner for the purposes of the record what you mean when you use the term "managed price"?

A. I do not say that in substance, or otherwise. Would you quote my statement that you paraphrase that way?

Q. You used the term "managed price"?

A. Yes, but I did not—

Q. In connection with identity of price.

A. Yes.

Q. And I think I am correctly quoting you when I say you said that that indicated to you a managed price.

A. I have tried—I may have made the statement which I would like to withdraw, I do not remember making it, but I tried repeatedly in my testimony to make clear that in my judgment there are different kinds of uniformity of price,—that I will not speak of uniformity of price without qualification, that I do not use such phrase as identity

of price except in a context in which I explained the type of identity, and, therefore, any statement attributed to me with respect to identity of price, and saying nothing else about the nature of identity is, I insist, a type of phrase which I would not willingly and deliberately use.

Q. Now, Doctor, if you used it in connection with the hypothetical question, and quoting identical delivered prices in connection with the hypothetical question,
15827 will you explain what you mean by the term? You did use the term "managed price"?

A. Yes, I used that.

Q. Will you explain what you mean by the term "managed price" when you used it?

A. I mean by a managed price—and it may be an individual use of terms—I don't mean that that is a recognized term, I mean I am speaking as an economist, but I don't want at this time to insist that that particular term would be used for the phenomena, I am not saying that it would not, but I don't want to use whatever authority I have as an economist to suggest that that is the way an economist would spontaneously define "managed price," or that he would use the term at all; but, as I used it, I meant by a managed price a price which was not the outcome of the spontaneous individual behavior of individuals—unpossessed—or without possession of a plan or pattern worked out in advance for them in which they—they adhere and recognize some kind of obligation to adhere to.

15884 By Mr. Zimmerman:

15890 Q. From your knowledge and experience would you say that all purchases of cement are decided upon the basis of the cost at destination, or not?

A. I have no knowledge, direct knowledge, or experience about cement purchases or sales.

Q. You never made any study of it at all?

15891 A. I never had firsthand contact with invoices, with the books of the firms or books of the purchasers or—

Q. Have you ever made—

Trial Examiner Norwood: Let him finish the answer.

Mr. Zimmerman: Pardon me. Strike out my interjection.

By Mr. Zimmerman:

Q. Won't you please continue?

A. I don't recall now, what I need add to that that I

have never had any occasion to nor have I, without occasion, inquired of cement dealers at what prices they sold, nor had access to their books or cement buyers, what prices they paid.

Q. Would you say you have never made a study of the pricing methods in the cement industry?

A. I certainly have never made a firsthand study of the actual pricing methods of the cement industry.

Q. The extent of your knowledge is what you have learned from your examination of documents of the Trade Commission in preparation of this case?

A. Not all. I also read and reviewed Willis and Byers' book which was written on behalf of the cement industry. I have run across a certain amount of literature written by the trade but I have never been in a position to verify the accuracy as to price statements or the statements that they made.

15893 Q. For all of our purposes here the normal pattern would be that all purchases are decided upon the basis of cost at the destination?

A. That is right.

Q. That being true, the cost of freight—since we will assume for the purposes of our examination, now, that we are going to ship in railroad cars and carload lots for the most part—the cost of freight would be an essential element of the destination cost, wouldn't it?

15894 A. To the buyer?

Q. Yes.

A. That depends on what the seller does about the cost of freight. The only essential point to the seller is that the buyer gets it at the price it is delivered.

Q. If he makes his decision on the basis of purchase of the cost at the destination he must necessarily include the freight.

A. The buyer doesn't have to know anything about the ingredients of the cost to him. The cost to him is equivalent to the base. He needn't know more than that.

Q. So that the cost at the destination, then, so far as the buyer is concerned, we may refer to as the price?

A. The cost to the buyer is the same thing as the price that the buyer pays.

Q. That is right.

Now, let us consider this hypothetical question that was propounded which was referred to, I believe, as occurring

on pages 15621 and 15622. At the conclusion of the several assumed facts in the question you were asked: "Take all those things together and then tell us whether or not in your opinion that corresponds to any sort of competitive method of pricing with which you have become familiar in your studies and experience."

15895 Now, what competitive method of pricing with which you have become familiar in your studies and experience did those facts which were assumed in the question correspond to, if any?

A. I know of no case from my study and reading which that pattern even approximately fitted except what I gathered from study and reading might be the case in connection with the American steel industry and the cement industry.

15896 Q. Let us consider the make-up of the assumptions that are in that hypothetical question. It starts out with the assumption that there is a general practice in the cement industry of mills quoting and selling only at delivered prices. Now, if we should assume that mills in the cement industry sell at delivered prices and also very frequently sell on f.o.b. mill prices and should insert that into the question, would that have affected the mean-

15897 ing of it, so far as you understood it?

A. It would have affected it very importantly, if these very frequent sales were available to all buyers, regardless of their location.

Q. Let us assume that they are available to all buyers who ask for them. Would that change the meaning?

A. Very substantially.

Q. The further assumption is made of mills in this industry refusing to quote and sell f.o.b. mill. Let us suppose that we assumed that a great many of the mills in the industry have for many years last past, when requested to sell f.o.b. mill, done so and that there are but a few of them that have ever consistently refused to quote and sell f.o.b. mill when they were asked to do so. Would that have changed your response and your comments upon the hypothetical question?

A. Yes, it would have.

15902 Washington, D. C.,
February 16, 1939.

15906 DR. JACOB VINER thereupon resumed the stand and testified further as follows:

*Cross Examination by Mr. Zimmerman (Continued)*

15907 Q. What did you understand it to mean as used in the question?

A. I understood a basing point to mean a point, a geographical point such that if you figured a mill net price as of that point plus freight and you would find that throughout a certain area with somewhat circular circumference, the prices at which transactions were actually made by that mill, would all be reducible to a uniform mill net for that mill and that you would find that the prices of other mills whether located within that area or not would be equal to the prices computed in the way I have indicated.

Q. And when you say "the prices would be equal to—" you are referring, now, to what we call a delivered price?

A. The prices paid by the buyer.

Q. Yes, or what is commonly called "delivered price". or "destination price"?

A. I prefer my term for it—

15908 Q. I know you do, Doctor, but is there any difference between the two?

A. Well, because when I say the price paid by the buyer I mean that is the price he pays for something he gets. It might not be the price received by the seller you have in mind.

Q. But is there any difference between your term and the one I use, Doctor, "delivered price"?

A. I am not sure.

Q. Do you know of any or think of any?

A. Yes, I think of a possible difference.

Q. What is the difference between price as you used it and delivered price?

A. Well, for instance, a commodity may be sold by a certain producer—

Q. Keeping in mind we are dealing with a product like cement.

A. May I use, hypothetically, cement or—let me say commodity "A" which has some resemblance to cement.

A commodity is sold by a producer located at a certain point to a buyer located at another point.

What a commodity is is a different thing, at different stages, although—

Q. I am awfully sorry to interrupt you, but I want you, if you can, to confine your answer to the difference in
15909 the matter for your term for price and delivered price; not the nature of the commodity.

A. I am afraid this is necessary for my answer.

Q. All right; go ahead.

A. That the commodity sold by the producer of cement may be, in the economic sense, different from the commodity bought by the buyer of cement because the buyer of cement may be buying a bundle of things; one is cement, as a physical, tangible commodity and the other is transportation of that cement; whereas, the seller may be selling merely cement and not transportation, so that the thing bought by the buyer may be a different thing from that sold by the person called a seller of cement.

Q. And I suppose the buyer not only buys when he buys cement at the delivered price, he not only buys transportation, but he buys labor and every commodity of cost that goes into that commodity, up to the time it is delivered to him, doesn't he?

A. He buys all the ingredients of that commodity—

15910 Trial Examiner Norwood: He buys everything that has been added to the commodity?

The Witness: He buys every utility that is of interest to him.

He is not interested in the burdens that, in the past, may be involved, upon the producer.

By Mr. Zimmerman:

Q. He is not interested, then, in transportation at all, is he?

A. He may be buying a commodity delivered at a certain point.

15911 Q. Oh, yes, but I am asking you now, and I think you told me yesterday and I want to see now whether you want to change your answer at all; yesterday you told me he was not interested in transportation at all if he bought at a delivered price.

15912 A. He is interested in a commodity at a certain point.

Q. But if he buys it at the point he invoices, that is at his destination, he is not interested in transportation at all?

A. No, he has gotten the transportation he is interested in.

Q. All right. So that we are not in disagreement on that. Let us see if this definition would be in your opinion correct, for basing point, and a base price: When a mill has a mill base, or an f.o.b. mill price, sufficiently low that the sum of this price and freight to any single delivery point makes a delivered price lower than that of any other mill, similarly calculated, such a mill is a basing-point mill and such a mill price is a base price; is that correct according to your understanding?

A. I think that's correct, except I would like to add that as an effective base point, or an effective base point price.

Q. But, notwithstanding your desire to add—

A. Yes.

Q. —so far as the definition goes, does that agree with your definition?

A. It does, it agrees with it as one kind of base
15913 point price. There is the ineffective kind, too.

Q. Now, it would not really make any difference, then, whether there was an f.o.b. mill price, or delivered price, involved in that definition, a delivered price with a mill net after deducting the freight, would it?

A. Oh, no. I cannot define a base-point price or a base-point system without reference to the f.o.b. mill price. I would not know how to frame a definition which would not have to refer—

Q. Well, it would include it, then, would it?

A. It would have to specify it, and the relationships of the price to the buyer.

Q. You think your definition would have to include f.o.b. mill price?

A. In the definition, I think so. I might find differently, if I tried to frame one.

Q. I see.

A. But I cannot see now how I could leave out—

Q. Now, what do you understand the term to mean of a non-basing point, as used in the question?

A. Why—

Q. I refer to Mr. Wooden's question, you know.

A. Yes.

Q. The hypothetical question.

A. Yes. A non-basing point would be a point at
15914 which the quoted f.o.b. mill prices of the mills would be ineffective in at least part of the circumference of the circle they were in, in the sense they would be able to get no sales at those quoted prices in at least one direction.

Q. That is, you mean that it would refer to mills at quoted prices that were such that they could not make any sales upon them?

A. In some part of their geographic circumference, that their sales could be made at mill net prices equal to their quoted mill net prices, if at all—if at all, they could be made only in part of the circumference surrounding them, in some directions, and not at all in other directions. If they moved at all with their sales, you have some directions they would have to be selling at a mill net price lower than their quoted mill net price.

Q. That would be true of any mill that sold beyond the territory wherein it was closer freight-wise to the destinations than the territory in which it was selling, would it not?

A. No.

Q. Why?

A. It would not be true because such a mill would be able to sell in all directions surrounding its immediate location; it would not be able to sell at a mill net equivalent to its quoted price, around beyond a certain circle.

Q. That is it.

15915 A. Beyond a certain circle, but I am saying, my answer to the previous question, where a mill is not a base-point mill.

Q. Yes.

A. It cannot sell at all in certain directions, for any distance, not only a distance beyond a certain point, but for any distance beyond the base point, it cannot sell except at a mill net price which is lower than its quoted price.

Q. Well, again I will have to come back—because I am not clear.

Wherever any mill attempts to sell beyond the territory

where it by reason of its location, freight-wise, to destinations therein, has an advantage of location, it gets into a territory where if it sells at all it must be at prices, delivered prices, at least, which are lower, and gives it a lower net than it would realize in this territory where it has the advantage of location, and, to that extent, it ceases to be a basing point.

A. It ceases to be an effective basing point.

15916 A. May I explain it? It ceases to be a basing point for that area beyond in which it cannot make sales at a mill net equal to its quoted price.

Q. Oh, yes. The question goes on and says: "Assume that delivered prices are the equivalent," and so forth. Now, would the question mean substantially the same to you if. instead of saying assume that delivered prices are equivalent, a base-point price plus rail freight from base point to destination, and that the lowest combination of base price plus rail freight determines which base point price will govern,—suppose we said, instead of that, assume that delivered costs are the equivalent, or destination costs are the equivalent of base-point price, the meaning would be substantially the same, would it not?

A. I would want to know costs to whom.

Q. There wouldn't be any delivered cost to anybody under any circumstances except the buyer, would there?

A. I don't know. The term—it seems to me, you might ask what, for a certain single producer, would be the cost of cement delivered at a certain point.

15917 Q. Well, can you answer the question?

A. But, if you mean cost to buyer, I mean, my answer is "yes."

Q. It would be the same. You could substitute delivered cost for delivered price.

A. Is that a question?

Q. Yes.

A. Would you read the question.

(Question read as follows:

"You could substitute delivered cost for delivered price.")

A. I would say it would be totalagus, the cost to the buyer if what he gets is the price he pays, not as an equation but as a plan of the identity.

15918 Q. Would you mean the price to the buyer?

A. I mean the quoted—a quoted mill price, the mill equivalent of a quoted price which—

Q. Well, the quoted price is the price in that instance to the buyer,—it is which destination cost will govern, is it not?

A. I think the answer to your question is "yes," that it is—the price which will govern, which will be that price which would be the lowest to a buyer at that point.

Q. Yes, at any particular destination?

A. Yes.

15920 Q. Now the question proceeds further and says, "Assume that rail freight is ordinarily paid by the buyer to the railroad company." Now, you understand by that that the buyer does pay the freight in that instance as the agent for the seller, do you not?

A. That was not in the question as I answered it. I took no account of facts outside the question unless I saw a relevance for them and then I introduced them in my answer.

15922 Now my question is this: Does it make any difference at all, so far as your answers to the hypothetical question, whether the buyer in such cases pays the freight and deducts it from his remittance to the seller, or the seller pays the freight in the first instance and simply collects the full amount of the delivered price?

15923 Q. What I am asking about now is whether it makes any difference in your answers.

A. Yes.

15926 Q. The passage that I referred to, Doctor, was this—and I am referring to page 15622, line 4—"Assume that rail freight is ordinarily paid by the buyer to the railroad company; is then deducted from the face of the invoice and the balance paid to the seller;" the question, Doctor, is this: Suppose that we assume that the freight is paid by the seller instead of being paid by the buyer. Would that change in the hypothesis, alter your answers to the hypothetical question propounded by Mr. Wooden, or your comment thereon, in any way?

A. I can't think of any change that I would have made in any question I recall, now.

15927 Q. In other words, it doesn't make any difference whether the buyer pays the freight in advance or has it paid by the seller and deducted from the invoice? Really, that is immaterial, isn't it?

A. That, of itself, is immaterial to the questions asked me, as I understand them.

Q. Whether the freight is paid in advance by the seller, or paid by the buyer and deducted from the invoice, it still is an inseparable part of the delivered price that is paid by the buyer, is it not?

A. I am repeating myself.

If the buyer buys the product delivered at his place—

Q. That is the only thing we were talking about, as I told you a while ago, Doctor, so let us not go over that again.

A. Well, then, he is. I assume he is.

Q. If you want to persist, go right ahead. It will be just a little more time taken.

A. Then I say reference to freight is irrelevant. He is buying a commodity delivered at that point.

Q. And the freight is, or the cost of that transportation is inseparably a part of the delivered price?

A. I say—I answered, "no." I answered "no." The buyer does not take—does not care what cost element—

15928 Q. I am not asking you what he cares. This is not a question of the state of his mind. What I am asking you about is the inanimate item of price; is it or is it not a part, inseparably, of the price that the buyer pays?

A. You mean is not transportation?

By Mr. Zimmerman:

Q. Yes.

A. I would say a price paid by a buyer can't be analyzed into inseparable parts.

Q. May we assume, then, Doctor, that we have reached, in that regard, the limit of your ability to analyze 15929 the items that go into that cost and eliminate that.

A. You said "cost." I said "a price can't be analyzed."

Q. All right. We will let it go at that.

Q. Would it make any difference in the result to the buyer, so far as getting the commodity in question into his hands at his desired destination where he could use it for the purposes of resale or fabrication, assuming that the delivery is by rail freight, whether he bought it f. o. b. mill at an f. o. b. mill price, which is exactly the same when you add to it the item of freight to his destination, as the delivered price that we have referred to?

A. It should make no difference to the buyer.

15945 Q. Can you imagine, under a system of pricing described in the hypothetical question, eliminating from it the fact assumed therein that delivered prices would always be identical at the delivery points; that prices could be materially reduced at all and that system still be in vogue?

A. That system is consistent with reducing prices if the assumption in the question that prices are matched describes only the day to day pattern, but does not exclude occasional lowering of base point prices by mills in order to get better volume for themselves or for the industry, or for some other reason.

15957 Q. Let us suppose that the nearby mills to the big public project haven't sufficient capacity to take care of the needs of the project, they can't deliver fast enough; would you still think that no mill located in an outside territory should be permitted to come in and offer to sell at a price at that public project which would yield a lesser net return than it had been getting in the nearby territory?

A. Yes, I would. If the local mills couldn't provide all that was needed they wouldn't have to quote a lower price, they could quote a higher price, as you have outlined the problem.

15978 *Cross-Examination (Continued) by Mr. Zimmerman.*

Q. I would like to refer, Doctor, to the question that was asked you by Mr. Wooden relating to the Exhibit 1112. If you have it conveniently at hand I will refer to it for just a moment; if you have it not conveniently at hand, it is perfectly all right.

Mr. Wooden: We can get it.

Q. The question, I think, appears at page 15669 of the record.

You were asked whether in your opinion as an economist the base price so arrived at is what you would call a competitive or a monopolistic price, and in your reply you said that only one firm at a time can establish a price at which it can make sales on this basis because it would be
15979 miraculous if two mills both following that practice were to reach exactly the same results.

Now, there would be no particular inhibition, that you know of, against all the mills in the industry making their

prices, to begin with, and to start with, on that basis, would there?

A. Could I see—could I wait for the exhibit? I don't recall the exhibit.

Q. Yes, I think we may wait for it.

A. Or could you describe it for me.

Q. Probably it won't take but a moment.

A. Yes.

Q. It will shorten the record, probably, if we could just get the exhibit.

A. All right.

(Mr. Wooden presents a volume to Mr. Zimmerman.)

Mr. Wooden: Page 23, was it?

Mr. Zimmerman: Yes, it was 23.

The Witness: It was a quotation—not a chart.

Mr. Zimmerman: No, it was not, I am sorry.

The Witness: Yes.

Mr. Zimmerman: It was this—off the record (indicating to witness in volume)—I just direct your attention to this part here.

The Witness: Yes.

15980 By Mr. Zimmerman:

Q. On the record, the part referred to is on page 23 of the exhibit, that ends with the language, "or base price plus freight charge from our mill to the customer's town," and so forth, and then goes on.

Mr. Zimmerman: Now, if you will read the question, please, Miss Reporter, so that we know where we are.

Trial Examiner Norwood: Read the question.

(Question read as follows:)

"Now, there would be no particular inhibition, that you know of, against all the mills in the industry making their prices, to begin with, and to start with, on that basis, would there?")

A. There would be no inhibition against their starting that way.

Q. That would be the perfectly natural way to start from the economist's standpoint—

A. No.

Q. —to take into consideration costs?

A. It would not—from the economist's standpoint the natural way to start would be to figure the highest price they can get, and make that the price for the volume they wanted to sell.

Q. Well, how would you know that if you had not sold anything yet?

15981 A. You would experiment.

Q. Oh.

A. It would be trial and error.

Q. Where would you start?

A. If you start from scratch that way, the economist hasn't any answer, he would say it just would be trial and error, which means you might start, substantially above what you figure to be your cost price, and then if you find you cannot get sales that way you would move.

Q. But you would have to know what your cost price was in order to know whether you were starting above, substantially, or substantially below it, would you not?

A. Oh, you would have to take your costs into account.

Q. So, to begin, the first things you would have to find out, when you were creating a price, an initial price, would be to ascertain your costs, would it not?

A. Yes.

Q. Now, you go on and say, "That is the practice of this firm and if there are other firms located at the same point then that firm," the one making the publication here, "must be the leader."

Now, what do you find in that language in the exhibit that would indicate that the firm that published that in a booklet was a leader?

A. The description by the firm of the manner in

15982 which it fixes a price which is a manner impossible to maintain unless the other firms at that same point are meeting its price.

Q. It didn't say anything about maintaining it, did it?

A. They say the price of Lone Star cement is made up of the following, which I interpret it to mean that day after day they sell at that price.

Q. You add a little something that is not fair in the way of an inference?

A. I didn't add anything that I think was not intended to be, by the author.

Mr. Zimmerman: What was that answer?

(Answer read.)

Q. There is nothing ambiguous about it.

A. About this?

Q. Yes.

A. I don't think so.

Q. And it might, nevertheless, have indicated the manner in which they originally set up their price?

A. No, I wouldn't interpret it that way.

Q. Would you know how long they would remain the leaders, from anything you saw in that exhibit?

A. For as long as that situation continued that they were making up their price in that way and that they were selling at that price.

15983 Q. You would take it, then, that only that concern would ever make up its price in that fashion?

A. While the state of affairs described by this passage continued.

Q. It would depend to some extent on who got there first, wouldn't it, in making a price up on that basis?

A. During the continuance of the effectiveness of the situation described in this paragraph that firm would be the leader.

Q. Suppose some other firm, before this firm started in business, had already begun the practice?

A. This couldn't have been started unless they took over the leadership at the time they started this method.

Q. Even though the other concerns were operating on exactly the same basis?

A. Even though—yes.

Q. You couldn't tell by reading that, however, whether Lone Star remained the price leader in any particular locality for a day or a week or a year, could you?

A. I couldn't know that without additional information as to whether they were making sales, but if they were making sales I would know they were continuing to be the leader in the area.

Q. You didn't know how long they continued to make the price that way, did you, from the publication?

15984 A. No.

Q. You wouldn't know at what moment some other concern had set a new low in the territory they had served and they would have to meet that or cut below?

A. Then they would discontinue what they were doing here.

Q. You wouldn't know when that occurred?

A. No, I wouldn't even know if the passage was true.

Q. So that before you could determine finally the position of the publisher of that statement in the market from time to time you would want time to observe the facts of

what happens from time to time in the making of prices in the territory that they serve, would you not?

A. I would want to verify the truth of all they say. That would be all I need.

Q. You wouldn't find it necessary to observe the pricing practices and methods that went on from time to time? You would want time to do that, wouldn't you?

A. Yes. There would be lapse of time in order to check the validity of the statement.

(Mr. Zimmerman refers to a copy of the transcript.)

Mr. Zimmerman: I assure you I am saving time by going through and trying to cut out as much as I can, here.

Trial Examiner Norwood: Yes.

15985 By Mr. Zimmerman:

Q. Would you consider that we are, in this country, still in a period of depression, Doctor?

A. Very much so.

Q. And would you consider that in a period of depression under pricing methods such as described in Mr. Wooden's hypothetical question there would be any likelihood of a considerable increase in the sale of such a commodity as cement?

A. Is the question complete?

Q. Yes.

A. I don't know how to answer.

Mr. Wooden: I would suggest that the element of price might be put into the question.

Mr. Zimmerman: Thank you, Mr. Wooden.

We will have the question read.

(Question read.)

By Mr. Zimmerman:

Q. Assuming that the price of such a commodity was not economically too high?

A. I cannot answer that question.

Q. You wouldn't even have an opinion on it, would you?

A. I—I would have to get what you meant by "economically too high," and I—

Q. Well, we defined that some time this morning,

15986 did we not?

A. Oh, it would in that sense that we—I think agreed upon—

Q. Yes.

A. —or I explained myself this morning, I am prepared to answer your question.

Q. What would you say?

A. That a period of depression is consistent with a substantial increase in sales, if the price immediately raised under certain circumstances—if you are in that part of the depression in which the business cycle is on the upward grade.

Q. You think it is now, definitely, do you not?

A. I am not at all sure.

Q. Well, what is your opinion?

A. Well, I don't like to spread my pessimism. I think it depends upon many things. It depends on policy, and I don't—I don't value my own prophecies on such matters.

Q. Oh, I won't put any value on it—

A. Fine.

Q. —one way or another, it is quite informal.

A. I say that my own opinion, for what it is worth, is that we may be in an indefinite continuing depression unless there are important changes in governmental policy.

Q. Would it be likely, without any considerable diminution in price, or any diminution in price f r, say, over a period of last year, in a product such as cement—

15987 sporadic exceptions here and there are excluded, of course—in a period of depression such as we are now in, would there be likely to be increased sales in any considerable quantity?

A. I think there would.

Q. Why?

A. Because I think that if the price pattern were such that those commodities for which the demand fell off most in the depression—fell most in price—the buyers of such commodities would space the time of their purchases so as to buy them in the slump times, and use them or hold them, with the result that the economy would tend to be stabilized and then the intensity of the cycle would be much lessened.

15991 Q. Now, Doctor, with reference to your use of the term "free competition." You, in the course of your work, read the publications of other economists very widely, do you not?

A. I think so.

Q. Would you say that this is true as a matter of fact, from what you have observed, that the definitions of what

free competition is vary with different writers on the same subject, with the same writer on different subjects, and indeed with the same writer on any particular subject?

A. I would say there is certainly a very substantial amount of truth in that statement.

*Redirect Examination by Mr. Wooden.*

Q. Dr. Viner, Mr. Zimmerman asked you whether an increase in the volume of sales would indicate that the price of cement was not too high.

What would you say if a diminution or decrease of the volume of sales, substantial in character, produced no recession in price?

15992 A. I would say that the price was economically too high to obtain proper utilization of the productive resources in that industry.

Q. Assume that in the summer of 1932 the price of cement in the Middle West base points was put up 40 cents a barrel; can you reconcile that with any knowledge you have about the condition of supply and demand at that time?

A. Well, if the situation in cement—

Mr. Leisure: Your Honor pleases, he is being asked now specific questions about factual material, and unless there is some showing that the Doctor has had an opportunity to study that, I do not think his opinion would be of—

Trial Examiner Norwood: Read the question.

Mr. Leisure: —should be asked for on that kind of a question.

Trial Examiner Norwood: Read the question.

(Last question read.)

Mr. Zimmerman: Now, I want to suggest this further, as an objection, that had they wanted to go into that they had plenty of time to do it on direct examination and they did not do so and it has not been brought up in cross-examination.

Mr. Wooden: You brought it up. You didn't mention the year, that is all.

15993 Mr. Zimmerman: I didn't bring up any question of a raise of price in the Middle West. If they are permitted to go into that I do ask leave to develop the

facts and ask questions about it to bring out the other side of the picture.

Trial Examiner Norwood: Read the question.

(Last question again read.)

Trial Examiner Norwood: The objection is overruled. Answer the question.

Mr. Wooden: "Condition of supply" instead of "operation."

Mr. Leisure: May I point out, Your Honor, the question doesn't indicate anything as to supply or demand so that the witness could form an intelligible answer to that question?

Trial Examiner Norwood: What was the answer? Read the answer.

The Witness: Well, I haven't answered yet.

Trial Examiner Norwood: Go ahead and answer.

A. I don't know what the conditions of supply and demand were in that year in the cement industry, but if the conditions in the cement industry were at all like what they were for industry as a whole or industry in general, a substantial increase in price at that time was inconsistent with the existence of a freely competitive market.

15994 By Mr. Wooden:

Q. And if I asked you to assume that the demand for cement at that time was declining, what would your answer be?

A. It would strengthen my answer.

Q. Do you know any standard by which to determine whether prices in an industry are too high or too low, except the standard of competition?

A. I think, yes, that where competition does not prevail I think approximate standards could be found if full data were available, but they would be very approximate.

Q. Well, as it stands now, and without knowing or attempting to fix such standards, what standard does the economist have for determining whether prices in an industry are too high or too low at a given time?

A. For a non-competitive or for a competitive industry?

Q. For a competitive industry or for a non-competitive industry, either; take them both.

A. For a competitive industry I would accept the prevailing prices as being the best available prices for prop-

erly allocating consumption as between different buyers and between different commodities and properly allocating resources as between production of different commodities, but if the industry is not competitive the determination of what is a proper price, given the construction of the industry, is a very complex question and you
15995 would have to weigh many factors against many others.

Q. You said something in reply to a question of Mr. Zimmerman's about a customer, that a customer should pay more the farther away from the mill he was. Did you mean to pay more at the more mill net or more because of the added transportation, or what?

A. Just the latter. He ought to pay more for the commodity as delivered at his door.

Q. Do you think he ought to pay more in terms of mill net than a customer located near the mill?

A. No, I think he should pay the same mill net.

Q. Mr. Zimmerman asked you a number of questions and obtained a number of answers about comparing costs and prices. What did you, as an economist, compare with cost to determine whether a sale is or is not below cost?

A. I would compare the price received net at the mill with the increase in aggregate expenses, costs of the mill resulting from the production of the units sold.

Q. Do you see any way of determining whether a given sale of cement it at, above, or below cost except by comparing that cost with the mill net on the sale?

A. No.

Q. That being true, is the mill net the price?

15996 A. If the commodity sold is cement as of that mill, then I would say the mill net is the price.

By Mr. Wooden:

Q. As I understand it, your testimony regarding differences or discriminations in price related to differences or discriminations in mill nets; is that correct?

15997 A. That is correct.

15998 Q. I understand you to say in response to Mr. Zimmerman's questions that the buyer was not interested in the cost of transportation.

A. The buyer was not interested in the cost of transportation if he was not buying transportation as a separate commodity.

If he bought a bundle of utilities, of goods such as the physical commodity and the transportation, he was
15999 not interested in the separate ingredients, but he might buy them separately and then he would be interested.

Q. If he could buy them separately he would be interested?

A. If he did buy them separately or were available to him separately.

Q. If he could buy them separately and found that the transportation was different from different points of supply, do you think he would be interested then?

A. He would be interested in determining where he should buy.

Q. Why?

A. Because what he wants is to get the lowest aggregate cost at his point of delivery.

Q. Mr. Zimmerman also asked you a question as to whether it made any difference to the buyer whether he bought f. o.b. mill, at an f. o. b. mill price, that was equivalent of the delivered price. What would your answer be if you took into consideration different transportation costs from mills quoting or selling at an f. o. b. mill price?

A. May I have that question read?

Trial Examiner Norwood: Read it.

(Last question read.)

A. Why, if the price whether f. o. b. mill or delivered was the lowest price at which he could get the cement where he wanted to it would make no difference to
16000 the buyer as to the form in which it were quoted to him, but if it meant it restricted his choice and his possible search for cheaper ways of getting the commodity, if it involved that, it would make a difference.

Q. Would it make a difference to him if he could buy f. o. b. mill as to what the transportation charge was?

A. It would make a difference to him if he could buy f. o. b. mill and if the result in the price laid down at where he wanted it was different from what if would be if he bought it at a delivered price.

Q. Now referring to Mr. Leisure's cross examination. I believe you said in response to his question that you could think of worse things than dumping and that you didn't necessarily consider all dumping injurious. Did you have

in mind, in making those answers, the sort of dumping that you have testified about in the cement industry and in the hypothetical question put to you?

Mr. Leisure: I object to that question as leading.

Trial Examiner Norwood: The objection is sustained. If you ask him what he had in mind, he may tell us.

By Mr. Wooden:

Q. On direct examination and also gone into on cross examination you said that the set-up or the system described in the hypothetical question was about the
16001 worst you could conceive of, is that right?

A. That is right.

Q. How do you reconcile that statement with your statement to Mr. Leisure that you could think of worse things than dumping and that not all dumping was injurious?

A. My first statement was made with reference to setting up a system where, presumably, you had choice and my reference to certain practices being worse than, possibly, dumping had been with regard to the individual producer in a situation over which he has little or no control and also there are circumstances in which I think dumping is probably desirable, given the other circumstances.

For instance, if we levy—this is a supposition—if we levy a very high excise tax on tobacco and there was a large market outside and if there was no remission of the tax on export, it might very well be in the interest of the country, when it was not especially in the interest of the cigarette or tobacco manufacturers, to sell abroad at a lower price than they sell at home; or if an industry was under tight monopoly control in its home marketing and was charging, there, a very high price in relation to this cost there would be no view to the national economy to object; opinion would object, but I think opinion would be mistaken in objecting against that industry selling abroad, if this price
abroad also were a high price although not as high
16002 as at home but dumping in that hypothetical example which made it objectionable was the systematic reciprocal dumping involving cross-freights.

Q. And did that hypothetical question also convey to you any assumption with reference to the result of that systematic dumping with reference to identity of delivered prices?

A. Why, the question as I understand it assumed that there was matching prices which meant identity of delivered prices, so far as that was assumed in the question.

16003 By Mr. Wooden:

Q. I believe in response to a question of Mr. Leisure's you said dumping was done in foreign trade in order to obtain larger profits; is that correct?

A. You mean I said it was obtained?

Q. That is my understanding.

A. That is the ordinary objective of dumping.

Q. Do you see any reason to differentiate in the case of cement dumping, in your answer?

A. No.

Q. Wherein does this dumping by farmers that Mr. Leisure posed in some of his questions differ from the sort of dumping that you testified about on the basis of the hypothetical question?

A. Well, I remember two references to dumping by farmers, one being a case described of a cannery presumed to be an individual one in a small village and one individual farmer described coming to him with berries and finding that the cannery has a price at which he will take some, but not all, and he goes on to another village to dispose of the rest. I would call that, if it occurred, as fortuitous or sporadic dumping.

The other case cited milk, something about whether milk was not sold at two different levels of net prices to the farmer, and I replied—

16004 Q. "Prices to the farmer"?

A. Received by the farmer, at different farm net prices, and I answered, I think, that it was my understanding of the milk situation that where that has occurred systematically it has been the result of governmental aid in setting up that sort of a system and of open and formal agreement.

Q. In the case of the berries sold to the local canner, and then elsewhere, do you know whether it is a customary factor in such a case for the canner, or the grower, to have contracts with each other?

A. I don't—I am not personally acquainted with that.

Q. You indicated some difficulty in telling Mr. Leisure

what industries were engaged in dumping, I believe in foreign trade. What are the, if any, difficulties in ascertaining what concerns are dumping?

16005 A. My difficulty in giving a list of American industries that engaged in export dumping is basically and primarily the result of the fact that in order to determine the existence of dumping you have to know the domestic price, and you have to know the export price, and that those are not matters of common knowledge in this country; whereas, in other countries, it is easier to determine the existence of dumping because, to a 16006 large extent, the dumping practices there are open, acknowledged, recognized by the law, and without secrecy.

Q. Do you raise the matter of privilege as to giving any further information about such dumping, as you know of, in industries or in cases not coming within any claim of privilege you may have made?

16008 A. I don't think it made any difference whether I claim privilege or not, because I cannot recall 16009 from this confidential information what the particular commodities were, they have not stayed in my mind, I was not interested, so that I gave all the concrete cases that I was able to think of at the time whether with or without the confidential sources of information that I had.

By Mr. Wooden:

Q. When, Dr. Viner, did you publish your last discussion or opinion upon the subject of dumping?

A. Published in the Encyclopedia of the Social Sciences under—the article of dumping—I don't recall the year,—I should say about five years ago.

Q. (Showing volume to witness) I show you the volume to which you have referred, and will you tell us when that was published?

A. (Witness refers to volume) It was published in September, 1931, eight years ago.

Q. Will you give the page on which it appears?

A. It appears at pages 275 to 279—I beg your pardon—275 to 278.

Q. Is that publication later than the one that Mr. Leisure asked you about?

A. Yes.

Q. How much later?

Mr. Zimmerman: May I see it, please?

(Witness hands volume to Mr. Zimmerman.)

16010 Trial Examiner Norwood: Did you answer that last question?

The Witness: I am trying to recall what the correct answer is. I don't remember what the citation was from—nor what the date was.

Mr. Wooden: Will you give that a number?

(Thereupon a blue-covered document was marked for identification as Commission's Exhibit 2846.)

By Mr. Wooden:

Q. (Indicating) Showing you a paper in a bindery marked Commission's Exhibit 2846, for identification, and which includes four typewritten pages; can you say whether or not that is a correct copy of an article written and published by you?

A. I cannot vouch for the correctness of the copy, but I assume it to be so.

Q. Do you recognize the article itself?

A. Yes, yes.

Q. As one written by you?

A. Yes.

Q. Is it one from which Mr. Leisure read a certain number of statements, and asked you about them?

A. He cited some—this was the article from which a passage was cited.

Trial Examiner Norwood: Well, that was given a 16011, Respondent's number, was it not?

Mr. Wooden: Yes, it was for identification.

Trial Examiner Norwood: What was that, Respondent's Exhibit 102, was it?

Mr. Wooden: I can only assume it was the last one.

Mr. Withrow: 101.

Trial Examiner Norwood: Thank you.

By Mr. Wooden:

Q. Now, Mr. Leisure read from that article in which you stated that it was a good test or perhaps the best single test of the competitive character of prices for the authors of this Willis and Byers' study to show that changes in cement prices occurred with somewhat the same frequency

as changes in the prices of other standardized commodities.

Will you state whether or not in that same article you have made any statements which should be taken into consideration along with that one?

16017 Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. All right, Dr. Viner; what was it that you said was a good test and perhaps the best single test of the competitive character of prices?

A. Whether the prices respond quickly and freely to changes in the conditions of demand and supply.

Q. Did you also say in this article the following, referring to the second paragraph, with reference to comparison with prices of other commodities:

"The value of this test in this particular instance is nevertheless very nearly zero in the absence of any demonstration that cement prices were not already monopolistic in 1913 and in the absence on the part of the authors of any attempt to convince their skeptically-minded readers that other building materials are good examples of highly competitive commodities."

A. Yes, sir; I said that.

Q. Did you also say, in the same article:

"That there may well be ground for questioning the competitive character of most of the commodities listed whose prices underwent a greater increase than did the price of cement"?

A. I did.

Q. Did you say, also, in the article:

16018 "If a real test were sought why were not unquestionably competitive articles taken rather than articles which are themselves suspect"?

Mr. Leisure: If Your Honor please, Counsel is not asking the witness to explain or qualify in any way the subject matter I discussed with him. He is just picking out articles in the main article and reading them into the record. For them to be material or relevant to the inquiry they must be something which either qualify or explain the previous answers.

Trial Examiner Norwood: Do these expressions relate to that expression you were asked about by Mr. Leisure?

The Witness: Yes, they do; very much; because they

throw light on the question as to how you would apply the test which I said was the best test to the comparison of the degrees of flexibility of the other commodities and the implication is you must select these other commodities very carefully if they are to be subject to the best test.

16021 Q. Mr. Leisure was asking you about a hypothetical case where destination prices were $2 and $2.10 and $2.20 at the same destination. Do you understand anything like that exists under the method of marketing cement outlined in the hypothetical question?

A. I think not.

Q. If I were to inform you that on State highway bids that some bids at some destination make price quotations that are intentionally higher than others, what bear-

16022 ing, if any, would that have upon your answer?

A. If that phenomenon occurred I would interpret it as decidedly absolutely evidence that there was planning and management as to the price structure and that this was a device to create the appearance of competition with regard to price.

Q. Suppose the seller in the case of the $2, $2.10,

16023 and $2.20 delivered price, suppose the $2, and $2.10 men followed up to the $2.20 instead of the $2.20 man coming down to the $2.00 man, what would you say?

A. The question isn't clear to me.

Trial Examiner Norwood: Read it.

(The question was read.)

Mr. Leisure: "Say" about what?

By Mr. Wooden:

Q. What would you say as to the competitive character of that transaction?

A. That wouldn't be sufficient information to judge the competitive character of the transaction.

Q. Showing you Exhibit 175-A, a list of 11 bidders, each of them bidding per barrel $3.286854 for delivery at Tucumcari, New Mexico; what, as an economist, would be your opinion of identity of delivered price, to that extent?

16024 A. I would say that the appearance of absolutely identical bids under circumstances such as described in the question would be, to me, highly improbable under a system of—practically inconceivable under a system of active price competition.

By Mr. Wooden:

Q. Mr. Leisure asked you about meeting secret price cutting by the imposition of a base at the price-cutter's mill, as to whether that would produce different
16025 mill nets. As you understood the hypothetical question would there have been different mill nets prior to and independent of such imposing of a base, such imposition of a base?

A. I would like to have the question that was put to me originally read. I can't, from your question, get sufficient material to let me see the way to answering it.

16026 Q. Dr. Viner, in various questions Mr. Leisure asked you of whether you took certain factors into
16027 consideration such as capacity and location of mills and volume of demand, and so forth; in answering the hypothetical question, in what way, if at all, did you take any such factors into account?

16028 A. I took them into consideration in this way and in this way only, that in considering and studying the question to see what would be a correct answer for it I considered carefully, as carefully as I knew how, the question as to whether the question contained within itself sufficient assumption to make an answer possible or to make an answer possible without qualification or essential elements left out, and in considering my answers I based them on the fact that in thinking of what the proper answers were I took into account all the characteristics I could think of of an industry that might conceivably bear, necessarily, on the nature of the reply to be given to that question and for those to which—those points on which I was questioned I had taken them into account and had decided that whatever the nature of my answer would be to those questions it would not have affected my reply to the hypothetical question.

Q. Mr. Leisure asked you something about the factor of the industry operating below its capacity. Did you ever intend that the operation of an industry below capacity in and of itself indicated a lack of competition?

A. I don't recall that—in fact, I recall that I did not let the facts, whatever they were, with respect to the
16029 proportion of capacities being used, have any bearing on my reply to the hypothetical question, but I also recall, although somewhat dimly, that I was asked either on direct examination or cross examination, I was

asked questions about the consistency of persistent operations at partial capacity with reference to free price competition and I answered that I didn't think the two were consistent.

Q. I wasn't quite sure whether you fully intended to say whether or not you had any knowledge concerning conditions in the sugar industry.

What was your answer to that?

A. I said, as I recall it, that I knew virtually nothing about the sugar industry now, although I felt I knew a good deal about its pre-war history, but I didn't use that history, as I recall it, in any way.

Q. Did you ever examine any of the record or pleadings in what is known as the Sugar Institute case?

A. No.

Q. Now, in response to one of Mr. Leisure's questions you referred to the business cycle and the waste of human resources as one of the big wastes under the system of pricing covered by the hypothetical question. What do you refer to as the "waste of human resources"?

A. Well, the resources that go into hauling the freight two ways and the resources that go into the building
16030 and maintenance of the plant in excess of what would be needed in output at the prevailing rate of prices and—or the waste of resources which result, if it does result, from a price to the consumer higher than that which might be otherwise established, economically.

16031 By Mr. Wooden:

Q. Well, as to the waste of human resources; will you state whether or not you had anything in mind there relating to unemployment?

16033 *Recross Examination by Mr. Leisure.*

16035 Q. Doctor, with reference to Mr. Wooden's redirect examination, when he asked you whether or not you had taken into consideration, in answering his hypothetical question, certain factors which I had pointed out to you on your cross-examination, and which you told me you had taken into consideration.

Now, take the question of price cuts, for example. Had you taken into consideration the existence of large numbers of price cuts in the industry when you considered and gave your answer to the hypothetical question?

A. I don't think I took that into consideration. I hope I did not testify that I had taken into consideration the existence of large numbers of price cuts.

Q. And did—

A. I assumed, in fact, that large numbers of price cuts did not exist.

Q. Would it have changed your answer to the
16036 hypothetical question if it had included as a fact that there are large numbers of price cuts going on continually in the industry?

16037 A. Why, I would want the assumption as to the existence of prevalence of price cuts stated in very clear terms, and if I could state it in such ways, then it would modify very much my answer to the question by changing the character of the question, decidedly. If, for instance, I were to change it by saying that these base prices stayed for rarely more than a few days or a week, and are in constantly relative motion against each other, and there is a system of extended, secret price cuttings, meaning that a substantial portion of the sales are really not made as prices corresponding to this pattern, then I would say that the question does not really describe, it has inconsistent elements in it, and is describing two kinds of systems.

Q. Then your answer would have been different?

A. It would have been different.

16039 Q. Now, you said in answer to my question when I said: "Did you give consideration to number and location of mills, and price bases and those without price bases?" and you said that you did?

A. I did, in the sense that if the number of mills, say, had been five million, I would have answered the question differently; but if the number of mills was small, in other words, whether the number of mills was very great or relatively small was an important element in the character of my answer.

16040 Q. Well, which did you assume in the answer?

A. I assumed that the number of mills for the United States as a whole was certainly not greater than—

Q. Twenty?

A. Twenty or thirty thousand.

Q. You did not assume in your answer that there were not many?

A. In other words, I assumed that that was not what I

would call a large number of mills. Ordinarily, I would say that if the mill—if the number of producers—goes to below a thousand I would begin to look into its price structure expecting to find special things. If you like, I will change my figure to a thousand, as a fairly critical point, although it depends on the importance of the industry.

16286 Washington, D. C.,
February 21, 1939.

16294 Mr. Wooden: Now, Your Honor, I hope we can shorten the present proceedings somewhat by what I am about to say.

I think when Mr. White first appeared for cross examination we moved for permission to withdraw Exhibit 1105 and offered at the same time Exhibit 2834. 1105 was not withdrawn owing to objections of Respondents, and I now move for permission to withdraw Exhibits 1104 to 1108, inclusive, for the reason that 2834 correctly and adequately represents the situation that 1104 to 1108 were intended to represent at the time but which, owing to lack of complete information, do not represent the situation as 2834 does.

16406 Washington, D. C.
February 23, 1939.

16409 HUGH E. WHITE thereupon resumed the stand and testified further as follows:

*Cross-Examination by Mr. Leisure (Continued).*

16460 Q. Now, in the seventh column on 1099-A, Mr. White, you have Annapolis, Md., and I note you have a figure of $1.78; do you find it?

A. Referring now to 1099-A?

Q. Yes, sir.

A. Yes.

Q. And so the exhibit shows that one company bid $1.78 at Annapolis; is that right?

A. It seems to.

Q. Isn't it a fact that two companies, according to the

basic material, bid this same price and should be in-
16461 cluded on your exhibit there? I am now referring to 378-A.

A. I see only one company tabulated as showing the figure of $1.78.

Q. That is the tabulation, but I am saying shouldn't the tabulation have included two companies there at that same figure, according to the basic material 378-A?

A. There are so many things that modified these figures that there was an attempt to show exactly what did modify them and to what extent, by the notes, relating to each of the bids.

16462 Q. So the note, itself, shows that there were two companies that did bid $1.78 at Annapolis; isn't that so?

A. Yes, if you take the note into account I think that is apparent on the face of the tabulation.

Q. So to get it straight, Mr. White, there were two bidders that bid $1.78 at Annapolis; isn't that so?

A. Yes.

Q. Are all of the terms and conditions of the bids, do they appear on the face of this tabulation?

A. Not all of them but it was intended and I think does reflect all of the conditions that modified the price, except the cash discounts.

Q. In other words, a selection was made as to the terms and conditions that you would include on your tabulation?

A. Yes.

Q. Who made that selection, Mr. White; who determined what terms and conditions would be included in the so-called tabulation of bids?

A. I indicated them.

16463 Q. And the ones that were to be left out?

A. Yes, I indicated them.

Q. Now, Copely in its bid at Brooklyn Navy Yard stated that the discount should run from the date of delivery; isn't that correct?

A. It may have.

Q. Don't you think that was important to include since you made a selection of what was important?

A. It might be if all discounts were taken advantage of.

Q. And that does not appear on your so-called tabulation of bids, does it?

A. No, it would not.

Q. In the case of other manufacturers this discount was

quoted from the date of shipment in the original bid, wasn't it, Mr. White?

A. It may have been.

16464 Trial Examiner Norwood: Why did you select this one instead of the $1.78, to put on there?

The Witness: I don't know except the prevailing bid was $1.83 and this bid was $1.83 but it was modified to the difference by the $1.78, and $1.83 by some conditions to which attention was called.

By Mr. Leisure:

Q. It makes it a little more identical, doesn't it, Mr. White?

A. Yes; uniformity of identical delivered prices—the degree of identity is affected by it.

Q. You didn't specify in your $1.83 or your $1.78 at the top, there, what the terms of delivery were in the exhibit, did you, Mr. White?

A. No, it was intended to show the figure and we

16465 apparently didn't see any modification of that figure.

Q. You have just said in the case of Universal-Atlas, down at the bottom, $1.83, that the terms of conditions of delivery were important in determining the price.

A. Yes; it was an alternate.

Q. Now, on the bids of Hercules and Florida, these companies quoted destinations prices subject to 10 cents discount for payment in 15 days from date of delivery, didn't they?

A. Hercules and Florida, you say?

Q. Yes.

A. They may have.

Q. And their competitors quoted on the basis of 10 cents discount 15 days from date of shipment, isn't that so?

A. I don't know. We took no account of the cash discount, as I recall it.

Q. And if you have a difference of several days there would be that importance to the buyer, wouldn't there, Mr. White?

A. It might well be a consideration.

Q. As to price, Mr. White, isn't that so?

A. No, I wouldn't say as to price.

Q. You don't think that affects the price?

A. It would depend on how badly a man needed his money.

Q. Ten cents a barrel might make a considerable difference.

Isn't it a fact that the Lone Star of Pennsylvania and the Lone Star of Virginia allowed only 30 days for
16466 acceptance of their bid?

A. They may have; that may be so.

Q. And Universal allowed 15 days for the acceptance of their bid?

A. That may be true.

Q. And all the other companies allowed 60 days for acceptance?

A. That may be so.

Q. And your exhibit does not indicate any of these differences in time?

16471 Q. Mr. White, were you able to do any checking on this Commission's Exhibit 1098 during the recess?

A. To a rather limited extent—

Q. Yes.

A. —the record was not out sufficiently early to enable me to answer all of them.

Q. Now, Mr. White, so that we may save time, I made some marks on the photostatic copies here, so that when you have not got them I think without wasting time we can go directly to the mark and then we won't have to spend time looking for it.

As to the one of the Lehigh bid being a correct figure of $2.31 per barrel f. o. b. Corry Field—

(Mr. Withrow assists witness examining exhibit.)

Q. —that is the correct bid, is it not, Mr. White? Look at the one we have marked "No. 1" there in red.

16472 A. Yes, this proves to be a price of $2.31.

By Mr. Leisure:

Q. Yes.

A. For delivery at Corry Flying Field.

Q. And as to the correctness of the figure shown in your tabulation for the Florida Company, will you look at where we had marked in red "No. 2"?

(Mr. Withrow assists witness in examining exhibit.)

Q. What is the correct figure according to the original bid there? Do you see it?

A. Yes.

Q. What is it? What does it say, the correct figure, the

one marked "2" on the original bid? What is the figure on "2"?

A. (Witness makes no response.)

Q. Don't you see it there, Mr. White, marked "2"?

A. Yes, there is a little doubt.

Q. What is the figure?

A. Well, there are two figures here, I find, one is 2.3371, as I have shown it.

Q. I am talking about the Florida Company.

A. Yes.

16473 Q. At f. o. b. Corry field, Mr. White,—will you call out the figure that is shown there for that?

A. Yes, the figure for Corry field is apparently 2.3266.

Q. Then, is your figure in your tabulation correct, Mr. White?

A. Yes, I think it is.

Q. Your figure is correct?

A. I think it is incorrect.

Q. Oh, yes.

Now, another one, as to the conditions set forth. That is, we found that these bids were qualified by certain terms and conditions, and that you only set forth certain of these terms and conditions; is that not so?

A. Yes, I set forth only those that I thought would modify the price.

Q. That you thought would modify the price.

A. Yes.

Q. Now, is it not a fact that Lehigh included a price decline in its bid? Look at the red figure, No. 4, which we have indicated.

(Witness examines data.)

A. Yes, it has a condition there, saying that in event lower prices are quoted that such prices will apply during the time they are ineffective.

Q. That is right.

16474 Now Lone Star also has included a decline clause, No. 5, which we have indicated there in red,—do you notice the "5"?

(Witness examines data.)

Q. Isn't that so?

A. I think these exhibits should be identified. These papers you are handing me by number, if I am to testify from these I want to make sure what you are talking about.

Q. I am merely trying to help you in locating the places on the bids, Mr. White. Those are photostats of the originals. If you find them to be inaccurate in any way of course you can correct them.

A. I don't want any doubt, now, as to what I am speaking from and there seems to be some.

Q. If you don't want to accept those photostats I will just let you do it in your own way, Mr. White.

A. I just want the record to be clear that I am using these photostats assuming they are the photostats of the original documents.

Q. If you have any doubt about it I want you to use your own documents.

Tell me whether or not it is a fact that Lone Star also included a form of decline clause on its bid? It is marked No. 5 on our photostat.

16475 A. Well, it says it would be the current price, whatever it is; not to exceed the price quoted in the contract. The inference is that if the price were lower that that would apply.

Q. That would operate as a decline clause?

A. I would think so, from the language used here.

Q. W. R. Taylor Company which you listed on your exhibit did not quote a cash discount, did they, Mr. White? We have indicated a No. 6 there on the photostat.

(Mr. Withrow hands photostat to the witness.)

A. This is such an indistinct copy I couldn't make it out with any degree of confidence and if you say they didn't I would be willing to assume they didn't.

Q. Take also the Alpha, Lone Star, Lehigh, and National; they all stated that their cash discounts were to run from the date of the invoice, didn't they?

A. The Alpha Company did, at any rate.

Q. Lone Star, Lehigh, and National.

(Mr. Withrow hands photostats to the witness.)

A. National did. Lone Star Company did.

Q. Now, there is only one left, Lehigh.

A. Yes, Lehigh did.

Q. Whereas the Florida Company allowed the discount from the date of delivery as called for by the invitation, didn't it? That is No. 8 on the photostat.

16476 Trial Examiner Norwood: How would that affect the accuracy of the tabulation as far as it has been able to show that these Respondents arrived

at the same figure as to their price? These two people, assuming that they agreed to reach the same price, agreed to a method which reached the same price underbidding and the other by giving a little concession on the side would not affect the conclusion, would it?

Mr. Leisure: May I ask Mr. White just one question on that as to answer to Your Honor as a result of Mr. White's answer?

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. This morning you said, Mr. White, that the selection for your tabulations—you made certain selections which, in your opinion, affected the price, and you have also said that this afternoon.

A. Yes, sir.

Q. Have you previously made the statement, and, specifically, did you make it in the brown book issued by the Commission, as follows:

"The offering of better quality or better service for the same money like that of more quantity is, in reality, a lower price"?

A. I don't think that was my contribution to that book.

Q. Do you disagree with that statement?

16477 A. No, I do not agree to a form of price concession.

The Witness: May I have that last question 16478 respecting the terms of Florida Portland Cement.

By Mr. Leisure:

Q. Florida allowed the discount from the date of delivery as called for in the invitation to bid?

A. I don't think the bid is clear in that respect. It says, "Discount will be allowed for prompt payment as follows: Ten cents per barrel for payment in 15 calendar days."

Q. And Florida allowed that, did they not? Look at No. 8 on there and see if that is not so.

A. It doesn't say, Mr. Leisure, whether it is from the date of the invoice or date of delivery.

Q. Well, so the record will be clear, then, just state what it shows and then we will get on.

A. I have read just what—

Q. Have you read what it showed?

A. Yes, sir.

16514 Q. Just check through your exhibit there, 1099-A, and take any of the others; enough to get an idea on it, Mr. White.

A. The first is the Alpha bid which has a rider saying that "the terms are 10 cents per barrel discount for payment in full including charge for sacks within 15 days from date of invoice."

Q. Don't you find the other competitors quoted similar to that?

A. Calaveras appears to have quoted 2 cents discount in 30 days.

Q. That, you have got on your exhibit, Mr. White; note 5. I am merely talking about the cash discounts that do not appear on your Exhibit 1099-A. Suppose you just take a glance at Medusa or North American or Universal-Atlas; take any of those in that group.

A. The terms of the western producers were evidently somewhat different from those in the East.

16523 Q. Mr. White, Universal-Atlas allowed only 15 days for the acceptance of their bid, did they not?

A. Yes, that seems to be the period.

Q. And the Lehigh Company bid contains a provision —before I come to that; all of the other companies allowed 60 days for acceptance, didn't they?

A. They did require an examination of the bids. That—

Q. Will you answer that statement and if you find it is not correct, correct it tomorrow, so that we can save time?

A. Yes; the printed form calls for that period and I see no modification of it here, in glancing through them.

Q. And you will correct it if it is not correct, tomorrow, won't you?

A. Yes, sir.

Q. The Lehigh bid contains a provision pro-

16524 tecting the Navy in the event of a decline in price, doesn't it?

A. Yes; they agreed to reduce their price during the period in which the lower price remains effective.

Q. Whereas Lone Star of New York and of Pennsylvania and of Virginia and North American and Penn-Dixie and Universal-Atlas and Vulcanite do not have any such provision in their bids?

A. I would have to examine each of those.

Q. Will you accept that statement and if you find it is wrong correct it, Mr. White?

A. Yes.

Q. All right.

Now, the bid of the Alpha Company contains a decline clause also, doesn't it?

A. This consists of several pages. I don't see it.

Q. Will you accept that statement that they have a decline clause and if you find it is wrong correct it, Mr. White?

A. Yes, sir.

Q. And so does Calaveras and California and Coplay and Cowell and Edison and Florida and John M. Friend, Inc. And these others which you have listed on your exhibit, the General Builders Supply Corporation, Hercules, Keystone, Lawrence, Lone Star of Alabama, Medusa, Monolith, Pacific, Riverside, Santa Cruz, Southwestern, and Yosemite; those all contain a decline clause, don't they, Mr. White?

16525 A. I don't know.

Q. Will you answer that and change it if you find they do not, Mr. White?

A. If that is the burden I should assume I suppose I will have to do it.

Q. You made this tabulation.

A. Yes, but it doesn't purport to go into that phase of it.

16527 Q. Without spending further time on that point, Mr. White, the Lone Star Company of Virginia
16528 bid for requirements at the Navy Yard in Charleston, S. C., did they not?

A. For delivery at Charleston, did you say?

By Mr. Leisure:

Q. Yes.

A. Yes.

Q. Isn't that correct?

A. That is correct.

Q. Mr. White, do you show that bid at all in your so-called abstract of these bids?

(Witness refers to data.)

A. It shows the figure opposite Lone Star of Alabama, where this appears to be of the Lone Star of Virginia.

Q. Well, you have shown something else, I am not

talking about that, Mr. White. I am talking about whether or not you show the bids you just read to me in your abstract at all.

A. Not as Lone Star of Virginia.

16529 Q. Now, Mr. White, to save time, the same character of omissions which we have been spending some time on here, occurred in Exhibit B of this same series, so that we won't have to take every one up in detail.

For instance, Penn-Dixie and Universal-Atlas quoted for acceptance within 15 days, and you do not show that in "B," do you?

A. No, that is a fact we did not purport to show.

Q. No.

Trial Examiner Norwood: Well, that does not appear in any of them, does it?

The Witness: No.

16530 Q. I thought you were looking to see whether or not Universal-Atlas quoted for acceptance within 15 days, and whether or not you showed it in your exhibit.

A. I said I did not show that information for any of the companies.

Q. Oh. And the Lone Star of Pennsylvania quoted for acceptance within 30 days; you did not show that, either, did you?

A. No.

Q. And the other competitors, quoting for acceptance within 60 days, you did not show that?

A. No, sir.

Q. So, to save time, Mr. White, you did not include any of this material in this "B" that you omitted from "A"; isn't that so?

A. That is correct.

Q. I mean by that, you did not show variations in cash discount as we indicated—as we saw, rather, in the previous exhibit?

A. I did indicate variations in the cash discount.

Q. In this exhibit?

A. In the case of Exhibit 1099-A.

16531 Q. Not all of them, Mr. White, did you?

A. Not for the difference in periods.

Q. You just separated—

A. Not for the difference in periods, but in the amount of cash discount, if any, I did indicate; but not in the

period within which it was given, if there were variable periods.

Q. Now, did you include it in the amounts in the case of Exhibit 1099-B, Mr. White?

A. I don't see any notes calling attention to the fact that there was any difference in the cash discounts, and—

Q. Well—

A. Therefore, I don't think I saw any difference, or, if there were any difference, it was not noted.

16533 Q. Even as to the producers, you have Edison Company quoting 10 cents within 15 days of shipment, and Florida Company and Hercules Company both quoting 10 cents within 15 days of delivery,—that would be a variation, would it not, Mr. White?

A. You are speaking of Exhibit 1099-B, now?

Q. Yes.

A. We haven't examined them yet, have we? The terms of Hercules with respect to 1099-B? I don't want to agree to that, until I examine it.

16534 Q. Well, satisfy yourself, Mr. White.

A. Well, I intend to.

Q. If the original material, the bids you have there in your hand, do show that variation between Edison and Florida and Hercules, as I have stated it, that would be a variation which you did not take account of in your Exhibit 1099-B, would it not, Mr. White?

A. Yes, that is—that would be true.

16535 Q. You just told the Examiner a moment ago, Mr. White, that you did take into account on your exhibit, variations, did you not?

A. (Witness makes no response.)

Q. I am now following that up and asking in certain specific instances.

A. Variations in the amount of discount, Mr. Leisure, —Perhaps you misunderstood me on that,—on the part of the producer. I did not exactly call attention to the terms,—anything but the prices made on the part of these non-producers.

Q. To have a correct abstract, do you not think you should have considered that, Mr. White?

A. Well, as I said before, I was not making an analysis of the difference of the terms; where there were differences on the part of the producers I did intend to call attention to that, and anything that modified the price.

Q. That is, in your opinion, as to what that modification of price would be,—isn't that what you mean to say?

A. Oh, certainly, I used my own judgment.

Q. Yes, you made the selection.

A. That's right.

Q. Now, your tabulation or abstract does not show that all of the remaining bidders quoted 10 cents in 15 days from date of invoice, does it?

16536 A. I have tried to say several times, Mr. Leisure, it does not pretend to show that.

Q. No. And there is no showing on the abstract, either, that Alpha, or Keystone, or Lehigh, the four Lone Star companies, North American, Penn-Dixie, Universal Atlas, and Vulcanite all used some type of protection against price decline, is there?

A. No, sir.

Q. Now, does your exhibit show that the Lone Star Company of New York, and the Lone Star of Pennsylvania, and the Penn-Dixie Company, and Vulcanite used a provision stating that freight increases, or decreases, should be added to or deducted from the bid price,—does your abstract show that?

A. No, sir; it does not state what would be the case in those contingencies.

Trial Examiner Norwood: Well, would that have been reflected in these bids that you have abstracted, even if they had asserted that?

The Witness: I did not see that it affected the price quoted.

Trial Examiner Norwood: Yes.

The Witness: And, therefore, I took no account of it.

By Mr. Leisure:

Q. It would have a very material effect upon the

16537 price paid by the buyer, would it not, Mr. White?

A. (Witness makes no response.)

Trial Examiner Norwood: It might have affected the desirability of placing the contract as between one or the other, but it would not have changed the figures; is that right?

The Witness: It might have been a consideration that the Government, under certain circumstances, or any other prudent buyer, would have taken into account.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. It would have been material to the buyer, would it not, Mr. White?

A. It might have been.

16538 Washington, D. C.,
February 24, 1939.

16543 HUGH E. WHITE thereupon resumed the stand and testified further as follows:

*Cross-Examination (Continued).*

The Witness: You asked me yesterday, Mr. Leisure, page 16524 of the record, to accept certain statements made as to contracts containing what was known as protection against decline clause, accept those statements as facts unless I found the contrary upon check.

By Mr. Leisure:

Q. Yes. Did you find those?

A. On checking them I find there are a few producers who did use that, but there are the following which didn't.

Q. Yes.

A. The companies which you mentioned, Alpha, Calaveras, California, Coplay, Cowell, Edison, Florida, John M. Friend, Inc., General Builders and Supply Corporation, Hercules, Keystone, Lawrence, Lone Star of Alabama, Medusa, Monolith, Pacific, Riverside, Southwestern, and Yosemite.

Q. Those were the ones that did not?

A. They did not.

Do you care to have those that did?

Q. Yes; I think it would be better to have the complete record.

A. The Lehigh Company did carry such a clause and, in general, the Lone Star of New York, of Penn-
16544 sylvania, and of Virginia carried the same clause. Also North American, Universal-Atlas, and Vulcanite.

I had sufficient time after seeing the record to check the other matters you asked about.

Q. On your Exhibit C of this 1099 series, I notice that the Penn-Dixie's bid at Pensacola there is quoted their prices f.o.b. at Pensacola, $2.63. Do you notice it on the bid of Pensacola where we have opened the bid for you?

A. Yes, sir.

Q. I was unable to find that at all on your chart or tabulation, Mr. White. Have you got it there or did you have any reason for leaving it out?

A. I didn't have any reason for leaving it out, certainly. It obviously was an oversight in not entering that figure.

Q. Yes. Take other such figures as this; for instance, that figure if it had been put—

A. Let me make certain that that applies to that particular item.

Q. That figure, if it had been put in for Pensacola, would have shown up one figure which was non-identical, wouldn't it, Mr. White?

A. This is West Pensacola whereas the schedule
16545 which others quoted appears to have been Pensacola. Just what, if any, difference it would be I don't see at the moment.

Q. Weren't all the other bids there for Pensacola, Mr. White? The ones you have listed as identical?

A. Yes, sir.

Q. So that should be included—

A. The headline—

Q. —Mr. White, there isn't any question about that?

A. Yes, the headline should read—

Q. All right, now—

A. —West Pensacola.

Q. —as to other such figures as this which are missing. will you notice Penn-Dixie Company's price of $1.8043, f.o.b. Richard City, there in the bid. I was unable to find that in your tabulation.

(Witness searches data.)

Q. That is also West Pensacola bid, Mr. White.

A. No, I don't see any price on lot 1180, which
16546 is being treated in this case, f.o.b. cars Richard City.

By Mr. Leisure:

Q. Well, Penn-Dixie has a bid there, Mr. White, of $1.8043 f.o.b. Richard City?

(Witness searches data.)

(Mr. Withrow assists witness at exhibit.)

A. Yes, there is a figure.

Q. So that we can save time, that correction should be made to complete the abstract; is that not so?

A. Well, this—yes, to comprehend all the prices quoted, whether f.o.b. mill, or otherwise, that should appear.

Q. Yes.

Now, without spending further time on specific figures, and without going through all these corrections that we went into yesterday, I wonder if we cannot summarize a little and save a great deal of time.

These provisions that we discussed yesterday, such as cash discount, are not given in your abstract, are they?

A. They are—you are referring now to abstract 10?

Q. Yes.

A. Exhibit 1099-C?

Q. Yes, talking about Exhibit 1099-C.

This exhibit does not state the cash discount given by the different companies, does it? I am just trying to summarize in one question—

16547 A. No.

Q. —a great many questions. Sir?

A. This exhibit does not include any of the bids of the Pacific Coast companies.

Q. And it does not state the cash—

A. Doesn't show any.

Q. —the cash discount given by the different companies, does it, Mr. White?

A. No, it doesn't.

Q. No. It does not indicate which companies did and which companies did not include any provision protecting the United States Navy against declines in prices; isn't that true?

A. The—

Q. Sir?

A. The invitation to bid does not include such a clause, and there are riders attached to some of these bids which do offer such protection.

Q. But, just for the moment, your tabulation does not include that information, Mr. White?

A. It did not purport to do that.

Q. All right. And it does not indicate which companies inserted in their quotations a provision concerning the effect of increase or decrease in freight, does it?

A. No, sir.

Q. And all of this information is contained in the

16548 original bids; is that not so?

A. To the extent some of them did, no.

Q. Yes.
A. It is contained in the original bid.
Q. Yes.
A. To that extent.
Q. Yes.
A. The bids don't inquire for that; the invitations don't ask for that information,—some of them do,—the attached riders give it.
Q. Now, you did not include in your graph, or abstract, the bid of North American Company, for instance—in the bid of North American Company the fact that there was a special provision concerning taxes being paid for the account of the bidder?
A. No.
Q. You have not included that, have you?
A. No, sir.
Q. Neither have you included that the Vulcanite and the Lone Star Companies of New York, Pennsylvania, and Virginia contained a similar provision?
A. No, sir.
Q. Nor have you included the fact that the bids of all the other cement manufacturers do not contain such provisions?
A. No, sir.
16549 Q. Now, take up Exhibit D of that same series, please, Commission's Exhibit 1099.
(Witness refers to data.)
Q. Have you got it, Mr. White?
A. All right, Mr. Leisure.
Q. Here again, in order to summarize, Mr. White, this exhibit is in the same general form and character as the ones that we have discussed heretofore under this 1099 series, is it not?
A. Yes.
Q. Here, again, in this exhibit, you have not included the fact that some companies quoted for acceptance within 15 days, have you?
A. No.
Q. Or that other companies granted five days?
A. No.
Q. While still other manufacturers granted 60 days?
A. That is correct.
Q. You have not included that?
A. No.

Q. And you have not included the periods during which a cash discount could be accepted, in your chart?

A. No.

Q. Or that companies such as Edison granted a 10-cent discount for payment in 15 days from date of ship-
16550 ment,—that does not appear on your chart, does it?

A. No.

Q. Or that companies such as the Universal-Atlas granted the 10 cents for payment in 15 days from date of invoice,—that does not appear in your tabulation?

A. No.

Q. Or that companies such as the Alpha stated that they were subject to withdrawal on five days' notice?

A. No, it would not include it.

Q. That is not included?

A. No, sir.

Q. And that some of the companies contained a provision for protection in the event of price decline,—you have not shown that on your abstract?

A. No, sir.

Trial Examiner Norwood: Hasn't the witness said that all the information that was left out on the first abstract was left out on the subsequent abstracts?

By Mr. Leisure:

Q. Is that true, Mr. White? Is all the information that was left out on the preceding exhibits in this series,—was that also left left out on this exhibit?

A. It was; and I tried to make plain what we had done—

Q. Yes.

A. —in the first tabulation.

16551 Q. Yes.

A. All those that affected the price, as I understood it.

Q. That would apply to Exhibit M that His Honor has just spoken of,—it would apply to Exhibit M, also of this series—the same information is left out of that exhibit, is it not?

A. Yes, sir.

Q. Now, take up Exhibit R, of the same series, the same information is left out of that exhibit?

A. Yes.

Trial Examiner Norwood: Well, doesn't it go right on through Commission's Exhibit 1099-A, the same state-

ments may apply to all of them with regard to the matter omitted?

The Witness: Well, the last tabulation of this company is 1099-W.

Trial Examiner Norwood: Yes.

The Witness: And what has been said as to the others applies to that also.

Trial Examiner Norwood: It applies from A to W?

The Witness: Yes.

By Mr. Leisure:

Q. And also, as His Honor said, on your Exhibit 1099-A to AA?

Trial Examiner Norwood: No, he excepted a few there.

16552 Mr. Wooden: Here is Exhibit 1099-A to AA.

Mr. Leisure: X, Y, Z, and AA are the notes to be attached to W.

Trial Examiner Norwood: Yes.

Mr. Leisure: So in considering the group they would have to be considered together.

Trial Examiner Norwood: Your omission applied, then, to all the series; is that right, Mr. White?

Mr. Leisure: Yes.

The Witness: As to these particular terms?

Trial Examiner Norwood: Yes.

The Witness: You are not speaking now of cash discounts, the difference in cash discount was shown with respect to some of those specific Coast companies.

By Mr. Leisure:

Q. But my point is, it was not shown as to all of them, Mr. White? While you picked out one, as you showed us yesterday on the Pacific Coast, cash discounts as to other companies you did not include?

A. No.

Q. And that applies to this whole series; is that not true?

A. Yes, that is right.

Q. And as to the Pacific Coast companies, you were not entirely consistent, were you, Mr. White, in showing the discount for them—for instance, take Commission's

16553 Exhibit 1099-D and show us where the Yosemite Portland Cement Corporation's cash discount is

shown on your exhibit? I mean, none is shown there, is there, Mr. White?

A. None is shown there.

Q. No.

A. If it were different from the others.—it was the intention to show it.

Q. But to save time on this whole group, the same omissions that we discussed all day yesterday, you have not attempted to include them in any of the rest of this series, have you?

A. No.

Q. And, of course, I am not suggesting that you should include them if they did not apply; I am saying only when they did apply on the original bids, of course.

A. Those were omitted as, in my opinion, not affecting the price.

Q. And that is consistent throughout the entire series?

A. Yes.

Q. You have followed that same practice—

A. Yes.

Q. —as we saw yesterday?

A. Yes, sir.

Mr. Leisure: If your Honor pleases, that enables me to make a motion at this time without further exam-
16554 ination as to this entire Exhibit 1099-A to AA.

The exhibits are an incomplete summary of the original Exhibits 378 through 384, for which these tabulations were substituted.

Mr. White has made a selection of certain material which he regarded as important but which, in fact, incorrectly portrays the bids made. There are many omissions even in the material which Mr. White purports to tabulate on the face of his exhibit.

As the result, the Exhibit 1099 is incorrect, and it does not prove or tend to prove any of the issues in this case, and we submit that it should be stricken from the record and; at the same time, Your Honor, on the hearing Tuesday we have not had a ruling yet as to our motions to strike on Exhibits 11 and 12.

Washington, D. C.,
February 28, 1939.

16684 GEORGE H. REITER was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

*Cross Examination by Mr. Leisure.*

16686 Q. Mr. Reiter, you have heard Mr. Wooden's statement with regard to the time consumed when
16687 you were on the stand before. Whatever the record shows is the best evidence on that. It was my understanding that you were on between February 2 and March 11, and consumed the greater part of the court hearing during that period.

Trial Examiner Norwood: Gentlemen—

Q. (Resumed) But, at any rate, you were testifying just as a general background on questions directed to you by Mr. Wooden, covering the Cement Institute, and the N.R.A. Code for the Portland Cement Industry, and the activities of your present company, which I think you have told us is the Universal-Atlas Company.

A. That is right.

Q. Yes.

Now, Mr. Reiter, as to the general background and the formation of the Institute, which Mr. Wooden questioned you about, when did you first become associated with the Institute?

A. February 1, 1930.

Q. In what capacity, in what connection was that?

A. As manager of the Chicago Division of The Cement Institute.

Q. When was it organized?

A. The Institute was organized in August, 1929.

Q. Now, at the time it was organized, Mr. Reiter, did the Institute have any expressed purposes?

16688 A. Yes, it did.

Q. And what form, if any, did that take?

A. The purposes of the Institute were set forth in the articles of association, I believe, in Article II of section 2 of that—

Q. You are now referring, Mr. Reiter, to Commission's Exhibit No. 138, are you (handing document to witness)?

A. Yes, sir.

Q. Can you tell whether or not the Institute had any purposes or objectives not expressed in Article II, Mr. Reiter?

A. No, Mr. Leisure, they were all expressed in this article (witness referring to Exhibit 138).

Q. Now, during your direct examination, Mr. Reiter, Mr. Wooden directed your attention to certain declared purposes of The Cement Institute—

Mr. Leisure: Page 300 of the record, Mr. Wooden—3000, excuse me.

Q. —and two of them were to adopt and promulgate the code of ethics for the government of the members and to establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute might deem advisable.

That is, the discussion that you have already had on that subject. What I wanted to ask you was, did the articles of association spell out in any other, or in any more de-
16689 tail, the purposes of the Institute?

A. Yes.

Q. Now, Mr. Reiter, in your experience with the Institute, will you tell the Examiner what you consider the primary purpose and activity of the Institute was?

A. The filing and the collection and dissemination of information on closed specific job contracts, and requirement contracts; the collection and dissemination of information on production shipments; stocks on hand, and originally, of cloth-sack returns; the collection and dissemination of information on credits.

Those are the items that are specifically set out in this article under—indicating the purposes of The Ce-
16690 ment Institute.

Q. Well, in your experience, were there any general purposes other than the ones you have already discussed on your direct and cross thus far?

A. This article further states a general purpose to collect and disseminate such other and further trade information as may be determined upon from time to time in accordance with the provisions of these articles of association; the—

Trial Examiner Norwood: That matter is already in evidence.

Mr. Leisure: Yes.

Trial Examiner Norwood: If you can—

Mr. Leisure: I was just trying to get any information that you might have of your own experience, Mr. Reiter.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. Now, in addition to these activities that you have discussed, did The Cement Institute have any committees, Mr. Reiter?

16691 A. Yes; a number of committees.

Q. Were all or any part of the activities which you have discussed conducted by the Cement Manufacturers Protective Association?

A. Yes, sir.

Q. When you say "yes, sir," what do you mean?

A. I mean that all of these activities, so far as I now recollect, were conducted by the old Cement Protective Association.

Q. Do you know whether or not the purposes of The Cement Institute were ever stated in any form at any time and restated? You have already told us they were stated in the Articles.

A. The Articles of Association.

Q. Were they ever restated in any form at any time?

A. I am afraid I don't understand the question, Mr. Leisure.

Trial Examiner Norwood: Were there any other statements of purposes besides the ones in the Articles?

The Witness: Not so far as I recollect.

By Mr. Leisure:

Q. And were they ever, for instance, discussed at any annual meetings in the form of restatement or anything of that kind?

A. Yes, they were.

Q. Well, will you explain it, please.

A. Well, the purposes were discussed at meet-

16692 ings, particularly at two annual meetings that I remember at which the activities of The Cement Institute were reduced from what they had been previously.

Q. Were those meetings before or after the N.R.A. Code, Mr. Reiter?

A. Those meetings were after the N.R.A. Code.

Q. Now, were these functions of The Cement Institute within your experience ever limited in any way, Mr. Reiter?

A. Well, they were limited, the maximum being the purposes as stated in the Articles of Association, but they were further limited below that maximum by action of the Board of Trustees.

Q. Did you ever have any statistical bureau?

A. Yes.

Q. Any other bureaus of that character?

A. The freight rate bureaus—

Q. Yes.

A. —existed almost throughout the entire life of the Cement Institute, down to the present time.

Q. Any other limitations of any kind?

A. I recollect no others.

Q. You have already told us what activity—of the activity of filing and checking of contracts, have you not?

A. Yes.

Q. You haven't told us anything about any general office activities. Did you have any bureau for marketing
16693 research or any committee of that kind?

A. We had a committee on marketing research and a number of other committees, some of which I can name.

Q. Will you explain for the record the nature of this research committee that you have just described?

A. The marketing and research committee was appointed by the president and confirmed by the Board of Trustees following some contacts and discussions which members of the industry had with members of the Federal Trade Commission and the discussion which I believe was entirely unofficial was concerning the marketing practices of the cement industry and the discussion was concerning the possibility of a joint study of the marketing practices of the cement industry.

The members of the cement industry who were present at this conference reported back to The Cement Institute and it was felt that whatever was done should be in charge of a committee of the Institute.

Mr. Wooden: I object, Your Honor, to the witness stating what was felt.

Trial Examiner Norwood: Yes. You can state what you felt, but don't tell what the other fellow felt, unless he said so; told you how he felt.

Go ahead.

By Mr. Leisure:

Q. You are attempting to describe what happened
16694 as to the impressions you personally got, Mr. Reiter?

A. That is right.

16695 Q. Mr. Reiter, as to membership in the Cement Institute—

Mr. Leisure: In the record on direct, page 2999 and 3000, Mr. Wooden—

Q. (Continuing) —you were asked certain questions as to who were entitled to membership in the Cement Institute. What are the qualifications for membership, Mr. Reiter?

A. Any person, firm, or organization who is engaged in the manufacture and sale of Portland cement is entitled to membership; that is, any manufacturer of Portland cement.

Q. Any manufacturer of Portland cement?

A. That is right.

Q. Are there any such provisions in the Articles of Association?

A. There are, yes.

Q. Just so we will have a reference: Where do those appear in the Articles of Association, if you know, without taking time?

A. They appear in Article 3.

Q. Are there any other conditions limiting membership in the Cement Institute other than as appears in Article 3, Mr. Reiter?

A. No; there are not.

Q. Now you said that any manufacturer of cement could be a member. What about State owned plants?

16696 A. They were also eligible to membership.

Q. And what has been your experience on that, with respect to interpretation of the Articles of Association that you have just referred to? Have they been interpreted so as to include or to eliminate State-owned plants?

A. Well, I remember that at one time, at least, the South Dakota Cement Plant were invited to join the Cement Institute as a member.

Q. How was that plant owned and operated, at that time?

A. It is owned and operated by the State of South Dakota; operated through a cement commission.

Q. And was the South Dakota State Cement plant ever a member of the Cement Institute?

A. No, it was not.

Q. I want to call your attention to Exhibit 607 and ask you to refresh your recollection—

16697 Q. After you have done so, will you explain that situation further to the Examiner? I think you have already told us that you recall an application being made. I don't think the record is complete until you have told us what happened.

A. This, of course, is a copy of the minutes of the Board meeting in New York on July 26, 1933, and it states that the chairman read a letter from—'

16698 A. Then I will state that this confirms the fact that the South Dakota Cement plant had been invited to join the Cement Institute and they declined to do so. I believe, further, and that is not in the—

Trial Examiner Norwood: Do you remember anything about yourself, after refreshing your memory from that? Don't tell us what is in the exhibit.

The Witness: Yes, sir; I remember about it although I was not there at that meeting, Your Honor.

By Mr. Leisure:

Q. Mr. Reiter, what was your position at that time with the Cement Institute?

A. At the time of these—

Q. Yes.

A. I was not with the Institute at that time.

Q. And what was your position at that time?

A. I was sales manager of the Missouri Portland Cement Company.

Q. Was there anything in the Articles of Association in the Institute after you became connected with it, or in the Institute activities, designed to give any advantages to non-member companies; Mr. Reiter?

A. No.

16699 Q. Well, then, was there any element of compulsion in any branch of the Institute activities?

A. None whatever.

Q. Was there a code of ethics?

A. A code of ethics was prepared at the time the Institute was originally formed and was cancelled by a resolution before the Board some time in 1933.

Q. Mr. Reiter, during the period you were connected with the Institute, were there any activities in your experience taken in the form of force or policing of provisions provided for in the code of ethics?

A. None whatever.

Q. This South Dakota plant: Did it subscribe to any Institute services?

A. Yes, it did.

Q. What?

A. It subscribed to all Institute services and paid the same dues for services to non-members as members paid for such services during a part of the time that the
16700 Cement Institute functioned.

Q. And these services were paid for by the State-owned plant?

A. That is right.

Q. And the services were rendered, as you said?

A. That is right.

Q. Do you, of your own knowledge, do you recall any members ever stating that non-members had any advantage over members?

A. I have heard that statement, Mr. Leisure.

16702 Q. Mr. Reiter, there are certain exhibits in the record having to do with the advantages or non-advantage of non-members introduced in evidence by Mr. Wooden and you discussed that subject with him on your direct examination.

I now ask you whether or not that subject came to you in any way in your official capicity, and if it did I ask you to tell the Examiner when and where, and under what circumstances?

A. Well, the matter did come to my attention in my official capacity as manager of the Chicago Division of The Cement Institute, in one case, at least, by a letter.

Q. And will you fix the time, first. Was this before the Code or after the Code?

A. This was before the Code.

Q. Yes. Go right ahead.

A. And near the start of the office in Chicago, and the letter, I recollect, is from Mr. Letzkus of the Pittsburgh Plate Glass Company.

16703 Trial Examiner Norwood: Don't tell us what is in the letter; but tell us what you did pursuant to the letter, what you said about it.

A. Well, as I say, the letter was received and it was answered by me.

16704 Q. Go right ahead.

Will you tell us, without describing what was in the letter, Mr. Reiter, what discussion you had, with anyone, on that subject, please, and when and where, and so forth?

A. Well, it was—the time was early in 1930, the exact date I don't remember, and the discussion was through this letter and answer, in which the writer stated his opinion—

16705 Trial Examiner Norwood: Do not state what the opinion is.

Go ahead.

The Witness: Your Honor, am I entitled to say what the letter stated?

Trial Examiner Norwood: I think not.

Mr. MacIntyre: The letter is in evidence.

Trial Examiner Norwood: The letter is here.

The Witness: Well, then, I am at a loss to know how to answer the question.

16706 By Mr. Leisure:

Q. You have told us that you, as manager, wrote a reply?

A. That's right.

Q. And that stated your position at that time?

A. That's right.

Q. Now, without telling us what was in the letter, tell us what your position was at that time, Mr. Reiter.

A. My position was that there was no advantage to non-members of The Cement Institute, except possibly the one that they were not paying dues, which, I understand, the writer of the letter received had in mind.

Q. Did you, during all of your experience in your official capacity,—can you tell the Examiner now whether you ever at any time found any other advantage other than the one of non-payment of dues to non-members?

A. I found none.

Q. Not in your experience?

16707 A. Not in my experience.

Q. We have discussed the general background of the Institute and its services. Will you tell the Examiner how it was set up, the functions of the Institute, and will you tell us when it began to function, for instance?

A. Well, the original office of the Cement Institute was in New York City, and that was set up about August, 1929, and became the general office of The Cement Institute, and the office of the general manager, who was appointed in October, 1929, I believe. That was also, in addition to being the general office, the office of the Northeastern Division of The Cement Institute.

Q. You mean there were—it was divided into divisions when it was set up?

A. Shortly after it was set up, divisional offices were established, the Northeastern Division at New York—

Q. You say shortly after divisions were established. When was the first division established, and where?

A. The first division was established at New York, and the second one was at Chicago, which began functioning on February 1, 1930, I believe on the same date that the division office at Kansas City started to function, and later, and about April of 1930, the division office was set up for the Southeastern Division at Chattanooga, Tenn. Those constitute all of the division offices of The Cement Institute.

16708 Q. That is, which was the Northeastern, did you say?

A. The Northeastern Division was at New York, and the territory of the Northeastern Division was U. S. Bureau of Mines Districts 1 and 2, comprising the New England States, New York, Eastern Pennsylvania, New Jersey, Delaware, and Maryland.

The Chicago Division comprised U. S. Bureau of Mines Districts 3, 4, 5, and 7, with the States of Western Pennsylvania, West Virginia, Ohio, Michigan, Indiana, Kentucky, Wisconsin, Minnesota, North and South Dakota, Iowa, and Eastern Missouri.

The Kansas City Division served U. S. Bureau of Mines District No. 8, which comprised Nebraska, Kansas, Western Missouri, Oklahoma, and Arkansas.

And the Southeastern Division, with offices at Chattanooga, served all territory west of—or east of the Mississippi River, including Louisiana and south, through and including Tennessee, Virginia—Tennessee and Virginia.

16709 Q. Then, as I understand you, Mr. Reiter, you have given us the organization of the divisions covering the United States.

Now, I asked you what time, between what dates were these four divisions which you have named, when was this organization completed?

A. It was completed by April, 1930.

16710 Q. That would be between August, 1929, and April, 1930?

A. That is right.

Q. Was there any division office for the west coast?

A. No, sir; nothing in districts 9, 10, or 11.

Q. Or 12?

A. Or 12.

Q. How about that?

A. None in 12.

Q. You have already told us that there was no division office on the west coast at any time prior to when? Has there ever been? Let me put it that way, first.

A. There has never been a division office of the Cement Institute on the west coast.

Q. Regardless of the fact that there was no division office, did the Institute render any service to those Rocky Mountain and Pacific coast districts prior to N. R. A.?

A. They rendered no service at all in districts 9, 10, 11, or 12 prior to N. R. A.

Trial Examiner Norwood: Rendered no services to local organizations, is that what you mean?

The Witness: To any members of the cement industry, Your Honor.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. And were any of those west coast and Rocky

16711 Mountain companies, were any of them members prior to the N. R. A.?

A. No, sir.

Q. Now, Mr. Reiter, were the activities of the division offices limited in any way?

A. Yes, they were limited as all other activities, by the Articles of Association.

Q. And how were they financed?

A. They were financed by special dues of members shipping into those districts, the special dues being over and above general dues.

Q. As manager of the Chicago Division, for instance, to whom were you directly responsible?

A. I was directly responsible to the general manager and we had an advisory committee for that division.

Q. How was it appointed?

A. It was appointed by the Board of Trustees.

Q. And to whom, if anyone, were the general manager of the Institute and the advisory committee responsible?

A. The general manager and the advisory committee were responsible to the Board of Trustees.

Q. Were there any advisory committees when the Institute was revived in 1933?

A. No, sir.

Q. You told us concerning the activities and limitations of the division. Was the authority of the
16712 Board of Trustees limited in any way?

A. Likewise the authority of the Board was limited by the Articles of Association.

Q. And from what you have said, Mr. Reiter, the activities of the division manager and the general manager, and the Board of Trustees were controlled by what, if anything?

A. By the Articles of Association.

Q. Now, as to the other officers of the Institute, Mr. Wooden asked you some questions about that.

Mr. Leisure: On pages 4504 and 4505 of the record, Mr. Wooden.

By Mr. Leisure:

Q. In order that the record may be complete on that point, for instance, who was the first president of the Institute?

A. Blaine F. Smith.

Q. Could you give us the dates of that, Mr. Reiter?

A. He was the first president, and, therefore, it must have been from August, 1929, and he continued until early in 1931, probably January or February.

Q. Sir?

A. Approximately February.

Q. And who followed him as president?

A. D. H. McFarland.

Q. And do you know the dates of his holding that office?

A. From the time he succeeded Mr. Smith, early
16713 in 1931, until 1933 in about the middle of that year, June or July.

Mr. Wooden: Again, Your Honor, it seems to me the witness is merely repeating what is already in the record.

Trial Examiner Norwood: This is all in the record.

Mr. Leisure: Only when there has been something left out have I attempted to go over and make the record complete. That is all I am trying to do.

Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. And who was it that followed, if you know, Mr. McFarland?

A. Mr. C. F. Conn.

Q. And do you know the dates that he held that position?

A. He served as president from 1933 until the latter part of 1934. I believe the annual meeting was in November of that year.

Q. And then who followed Mr. Conn, if you know?

A. Mr. George F. Coffin.

Q. He was the next president?

A. That is right.

Q. Do you know the term of office?

A. He served from November, 1934, until about—well, officially he was president until December, 1936, but he was incapacitated for a part of that last year and
16714 did not perform the duties of president since about April of that year.

Q. You have already said on direct examination, I believe, Mr. Reiter, that Mr. Rader was acting president for a time. Can you give us the dates on that?

A. I think Mr. Rader was acting president for about a month or two months in 1936, beginning with April, and, I believe, ending in May of the same year.

Q. That was 1936?

A. 1936; yes, sir.

Q. And who followed Mr. Rader as acting president of the Institute?

A. Mr. S. W. Storey.

Q. And can you give us the dates on that, please?

A. He served as acting president until the annual meeting which was either—that was held in December of 1936, whereupon he was elected president of the Cement Institute and still serves in that capacity.

Q. Now, Mr. Reiter, after the Institute was organized, as you have described, in 1929, and operated all of its

various activities, as you have also described, did it continue, then, did it continue them all from the date, from that date until the present time?

A. No, indeed.

Q. What happened?

A. Well, there were periods of activity during
16715 the life of the Cement Institute which varied greatly from each other.

The first period, the organization period, extended until early in 1931 and most of the activity ceased about April 1, 1931, and the only activity that was continued was that of the freight rate bureaus and that period has been referred to as the dormant period and continued until N.I.R.A. in 1933 when the Cement Institute was revived, for the purpose of submitting a code for the industry to N.I.R.A., and at the same time it was revived it took up again the same activity that it had performed prior to the dormant period and continued those through 1935 and a part of 1936, but its activities were reduced at the annual meeting in 1935, and in 1936, and there was a much restricted activity from December, 1936, until the present time.

16716 Q. That covers these fluctuations of activities, Mr. Reiter.

Now, take up the Institute itself, did it remain the same or did it increase or decrease in any way in membership?

A. During the late fall of 1930, and the early part of 1931, its membership was greatly reduced by resignations until by April of 1931 it had 20 or 22 members, I believe, approximately half of its total membership—or its maximum membership—during the organization period.

Q. What was its maximum membership, in your experience, Mr. Reiter—for instance, say, during the code period.

A. I believe that it had as members all but four members of the industry; in other words, it had 86 out of 90 members of the industry as members of The Cement Institute.

16717 The witness identified Resp. Exs. 125-A-D as the annual report, dated November 23, 1933, which the President of The Cement Institute sent to the members.

Mr. Wooden: No objection.

Trial Examiner Norwood: Received as marked.

(RESP. EXS. 125-A, 125-B, 125-C, and 125-D was offered and received in evidence.)

By Mr. Leisure:

Q. From this exhibit, Mr. Reiter, it appears that during this so-called dormant period, that you have told us about, until June, 1933, a force consisting of five persons carried on the activities of the Institute, and then the low point in membership was 21 instead of 22, as you have suggested, I think.

Does that coincide with your recollection, and do you have anything to add to those circumstances?

A. It does coincide with my recollection, and I have nothing to add.

Q. Now, you have told us that with the advent
16718 of N.R.A. there was an increase in the membership of the Institute.

What, in your experience, have you to say as to its effect on trade associations—N.I.R.A., of course.

A. Well, it had an encouraging effect on the formation and activities of trade associations, because they were suggested by the officials of N.I.R.A. as the medium through which industrial codes could properly be submitted—

Q. Yes.

A. —for approval.

Q. Was that also by the Act, itself?

A. I believe it was, by the Act, itself.

Q. Yes.

And Mr. Reiter—

Mr. Wooden: Your Honor—

Q. (Resumed) —was the Institute selected by the industry to draft—

16719 Q. Following just what you have said, Mr. Reiter, was the Institute ever selected by the industry to draft a code for the cement industry under the N.I.R.A.?

A. Yes, sir; it was selected as the vehicle for drafting and submitting a code.

Q. And did it so undertake this work?

A. It did.

Q. When was that, Mr. Reiter?

A. Well, the code was finally approved on November 27, 1933. The work of drafting and submitting, of course, occurred before that time, beginning, I believe, about June of that year, a number of drafts being prepared and discussed with officials of N.I.R.A., and drafts revised, and, so forth.

Q. Now, this board of trustees that you have told us about, did it remain the same or did it change in any way at the time of N.I.R.A.?

A. The articles of association were changed in 1933 to provide a different representation on the board of
16720 trustees; it provided for a trustee to be elected from each of the twelve Bureau of Mines' districts in the United States, and these twelve trustees elected seven trustees at large and those nineteen, together with the president and the treasurer, constituted the board of trustees.

Q. Now, with respect to that, Mr. Reiter, did each company have a vote, or how was that arranged?

A. Each company had one vote, irrespective of size.

16721 Q. When you say "had a vote," will you state, for the record, what happened at a general meeting with respect to a vote?

A. The same rule applied, namely, each company had one vote.

Q. How many officers did the Institute have, and what were they?

A. It had a president, one or more vice-presidents, a secretary, and a treasurer.

Q. I do not think the record yet shows, Mr. Reiter, when these articles of association were adopted; can you give us the date on that?

A. You mean the—

Q. The revised.

A. The revised articles?

Q. Yes.

A. Of the Association?

Q. Yes.

A. They were adopted in 1933, and I believe in June of that year.

Q. What was your experience at that time, if you had any,—was there any representative of the Federal Government,—or did any representative of the Federal Government make any finding as to that?

A. General Johnson in his letter of transmittal of the Industrial Code to the President for approval stated that The Cement Institute was truly representative—

16722 Mr. Paulson: Your Honor—

A. (Resumed) —of the Industry.

Q. I think, Mr. Reiter, you have already told us that this was about the time you returned to the Institute?

A. Yes, sir; I returned as of August 1, 1933.

Q. Were any further changes made, after you got back in the Institute's articles of association, during the life of N.R.A.?

A. The articles of association were again changed early in 1935 at the request of the Deputy Administrator in charge of our Code.

Q. Who was that, please?

A. Walter A. Janssen.

16723 Q. How do you spell that, please?

A. J-a-n-s-s-e-n. And the effect of that change was to allow members of the industry, not members of The Cement Institute, nevertheless to vote, for district trustees of the Institute, and other changes were minor, in my opinion, and were for the purpose of preventing—

16724 A. Other changes in the articles of association were designed in the opinion of the Deputy Administrator to prevent—

A. (Continuing) —inequitable restrictions on membership in The Cement Institute.

16725 Trial Examiner Norwood: This opinion, it was expressed at a meeting, was it not?

The Witness: He did express it personally to me.

Trial Examiner Norwood: Well, it was something that they acted on, was it not?

The Witness: What I meant to say, Your Honor, was that it was necessary in the opinion of the Deputy Administrator to remove some so-called inequitable restrictions on membership. In my opinion, it did not jibe with the fact that there was any restrictions on membership. That is what I meant.

Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. And regardless of your attitude about it at that time, the changes were made, anyway; is that so, Mr. Reiter, from what you have said?

A. That is right.

16726 Q. Now, take up the subject of new members.

At the time of the revision of these articles of association in June of 1933, as already appears, was the

membership of the Institute decreased or increased in any way?

A. It was materially increased. I believe that almost immediately there were 50 new members received into The Cement Institute.

Q. And I think you have already told us the percentage of the members of the industry that were in at that time?

A. Well, at the beginning of 1934 or early in that year there were 86 members out of 90 manufacturers in the United States.

16727 Q. During your experience, Mr. Reiter, were there two organizations or one organization? In other words, was there an organization known as the Code Authority and another organization known as The Cement Institute, or was there just one organization?

A. There were two organizations.

Q. Now, dropping the discussion with regard to the organization known as the Code Authority, let me ask you some more questions about the organization which you have described as The Cement Institute during the Code period. What, if any, division offices were established or re-established during this period?

A. Division offices were re-established at New York, Chicago, and Kansas City, covering the same respective territory that they served before.

Q. And as manager of the Chicago division, where, if at all, did you make reports?

A. Where did I make reports?

Q. Yes.

A. I made reports to the members of the Chicago Division and on request, at least at times, to the Board
16728 of Trustees, there being no general manager at that time, which is a distinction I wish to draw.

16728 The witness identified Resp. Ex. 126 as a report issued by him as manager of the Chicago Division of the Institute to members of that division covering the period from August 1, 1933 to November 1, 1934.

*Examination on Voir Dire by Mr. Wooden.*

Q. Mr. Reiter, would you name as many members of the Chicago Division as you can to whom this document was sent?

16729 Mr. Leisure: That is not voir dire examination.

Trial Examiner Norwood: To determine the character of the paper.

By Mr. Wooden:

Q. I understand it was sent to members of the Chicago Division?

A. Yes, sir.

(RESP. EX. 126-A, 126-B, 126-C was offered and received in evidence.)

By Mr. Leisure:

Q. From this, Mr. Reiter, I take it that the Chicago Division was opened again on August 1, 1933?

A. That is correct.

Q. You told us a moment ago it had been active up to what time?

A. The activities continued without change from February 1, 1930, until Aprjl 1, 1931, and then there was a dormant period and the office, itself, was discontinued shortly after that, and I don't know the date of discontinuance of the office.

Q. And then was reopened, you say, on August 1, 1933?

A. That is right.

16730 Q. During the same time what happened with respect to the Division office in New York? There had been one there, you told us.

A. Yes. The office in New York was continued but it was continued as a general office and there was no divisional activities carried on there except that the Chicago Freight Rate Bureau was moved to New York and operated from that office during the dormant period.

Q. You told us about the establishment of certain District offices. Did there ever come a time when additional offices were established, district offices?

A. The Kansas City division office was re-established on January 1, 1934, and there was no division office re-established in the Southeastern Division where one had been during the organization period.

Q. Did the members of the Southeastern Division report their contracts, Mr. Reiter, during the N.R.A.?

A. Yes, they did, they reported them to Chicago.

Q. And they were served from the Chicago office?

A. Yes.

Q. Do you know whether or not the New York office performed services other than the usual divisional services, for the Northeastern Division?

A. They performed the divisional services for the

Northeastern Division and it was also the office of the secretary and the general office of The Cement Institute.

16731 Q. How were the expenses of the general divisional activities met, Mr. Reiter?

A. By general division dues which were collected separately from special division dues and applied to all members, the general division dues applied to all members of The Cement Institute.

Q. We have already discussed certain services being rendered to the Pacific Coast companies, and it appeared that the Pacific Coast companies did not come into the Institute until 1933, from what you have already said.

After they did become members what service did the Institute render to these Districts 10, 11, and 12?

A. They rendered only the services of the general division to members of those districts.

16732 Q. Do you recall the time when the Schechter decision was rendered, Mr. Reiter?

A. Quite well.

Q. Will you explain, for the record, what, if any, activities, or what effect it had, upon the Cement Institute, at the time it was rendered?

A. Well, it had no effect on the activities of the Cement Institute, if that is what you mean.

Q. Yes. It kept functioning, as it had theretofore?

A. That is right.

Q. What about the freight rate service?

A. That continued, and has continued down to date.

Q. What about contract reporting?

A. Contract reporting continued for a considerable time after the Schechter decision.

Trial Examiner Norwood: Was the freight service operated during the Code?

The Witness: Yes, sir.

By Mr. Leisure:

Q. When you say "during the Code," by whom was that operated during the Code?

A. It was operated by the Cement Institute through special dues.

Q. Now, did the Institute continue to furnish any statistics after the Schechter decision?

16733 A. Yes, sir.

Q. Was there any difference in the character of information they had furnished prior to the Schechter decision?

A. Not at all.

Q. What about credit information?

A. Well—

Mr. Wooden: Your Honor, I do not believe anything on the subject of credit information was gone into on direct examination.

Trial Examiner Norwood: Well, I think that the Counsel should just simply bring out the differences, if any, and I think he said there was nothing, no difference, between the activities after the Code and during the Code.

Did you not say that?

The Witness: I have not answered yet as respecting credit information.

Trial Examiner Norwood: Well, as to all of your activities.

The Witness: There was no effect on the activities of the Cement Institute by the Schechter decision; there was no change in them at that time.

Trial Examiner Norwood: That is what I understood, Go ahead.

16734 Trial Examiner Norwood: What is the use of going into those particulars?

Mr. Leisure: Very good.

Trial Examiner Norwood: He said there was no change in the activities.

Mr. Leisure: Very good.

By Mr. Leisure:

Q. You have already told us that the Code Authority activities ceased with the Schechter decision?

A. They did cease with the Schechter decision.

16735 By Mr. Leisure:

Q. Mr. Reiter, as to these committees that we discussed this morning,—did they continue to function after the N.R.A. period?

A. They did for a time until the specific work covered by the committees was finished.

Q. Take the local Materials Committee, what happened to it? Did it cease to function?

A. It ceased to function about the middle of 1935.

Q. What about the function of the Labor Committee?

A. The Labor Committee ceased to function about the same time.

Q. And the Tariff and Tax Committee.

16736 A. They also completed their work by the end of 1935.

By Mr. Leisure:

Q. Well, now, as to these committees, what happened, Mr. Reiter, with respect to the appropriations for those committees, if anything, after the N.R.A. period.

A. Well, there was no provision in the 1936 budget of The Cement Institute for the expenses of any of these committees.

Q. I see.

Now, you have told us what happened until then; were they revived at any later period?

A. The—

Q. Take, for instance, the Tax Committee.

A. The Tax Committee was revived, and also the—

Q. Do you know when?

16737 A. Well, the Tax Committee was revived in 1936.

Q. What about the Tariff Committee?

16739 A. The Tariff Committee was revived in 1936—or, in 1937, for a short time investigating imports of foreign cement and protesting further elimination of the tariff on the import of foreign cement.

Q. You have already told us as to the Tax Committee; that it was revived. Will you tell the Examiner, if you have any recollection, as to the circumstances and the problems involved at that time.

A. The Tax Committee was originally appointed to handle particularly, together with the Institute attorney, matters referring to floor stock taxes, processing taxes on cloth bags, and they were later revived to advise 16740 industry with the help of Counsel on methods to pursue to secure refunds of compensating taxes on paper bags improperly collected.

16742 Q. Now, as to these committees, I think you said something about their work having been completed. What happened with respect to that?

A. Well, the work on which they were engaged was completed by the end of 1935 except for the two revival, revival of the activities covered by the two committees, namely, the tax committee and the tariff committee.

The witness identified RESP. EX. 127 A-D as an
16743 annual report, dated December 10, 1936, presented by him in his capacity as General Manager to the Board of Trustees of the Institute at their meeting held on December 17, 1936.

(RESP. EX. 127-A to D was offered and received in evidence.)

Q. Mr. Reiter, in addition to the discussion which you have already told us about with reference to curtailment after the N.R.A. decision, was there any printed document, or any definite provision set out as to curtailment after that time by the Institute?

A. The Board of Trustees—

Q. (Indicating.) I show you this exhibit, and ask you whether or not that refreshes your recollection any
16744 on the subject (referring to Respondents' Exhibit 127-A to D).

Trial Examiner Norwood: It seems to me that that exhibit just received contains exact information about that; it tells just what—

Mr. Leisure: Just what I was going to ask him.

Trial Examiner Norwood: It tells just what they dropped and just what they continued.

By Mr. Leisure:

Q. Does it, Mr. Reiter, is that what it does?

A. Yes.

Mr. Leisure: That has been received, has it?

Trial Examiner Norwood: Yes.

Mr. Leisure: Then I will not ask any further questions on that.

Q. Mr. Reiter, from what you have just said in describing this exhibit, as I understand you, those were the activities that they curtail, and I wanted to ask you whether or not; in your experience, they actually did curtail their activities?

16745 A. They actually did curtail the activities as outlined in this report.

Q. Thank you.

Now, what was your experience with reference to the status of the Institute, right after the N.R.A.?

A. Well, there was—

Q. What I mean is—was there any activity engaged in at that time as to the future of the Institute, as to whether it should continue or not?

A. Oh, there was a proposal to abandon The Cement Institute and—

Q. Do you know when that was, Mr. Reiter?

A. It was in the early part of 1936, and I believe it was considered at a meeting held in May of that year.

Q. Now, what, if any, action was taken with respect to that, Mr. Reiter?

A. Well, at that meeting a proposal was made to abandon The Cement Institute and the motion to do so was defeated by a large majority of the membership voting but, as an outgrowth of that meeting, a committee was appointed to study the field of activity open to the Institute in the future and to report back at a future meeting of the Board of Trustees.

Q. Now, as to the limitation after the N.R.A., which you have described, as a result of those limitations, I
16746 think you said there were five services that were continued; as a result of these limitations was the organization of the Institute changed in any way?

A. That was materially changed after September, 1936, at a meeting which was held at that time, the organization was materially changed as a result of that meeting.

Q. Now, just in what respect, for instance, were contract reporting and checking and credit information service discontinued at that time?

A. Yes, the contract checking, reporting and checking was discontinued as of October, 1936, in all division offices. What were the other items that you asked about?

Q. I said checking and credit information service.

A. Well, the credit information previous to that had only been collected and disseminated by the Kansas City office and that was discontinued, the Cement Information Bureau was discontinued in September, 1936. So far as I recall at this time, other activities were continued.

Q. What about the physical offices themselves that you have told us about? Was there any change with respect to those?

A. The division office at Kansas City was closed. The office at Chicago was kept open merely as an office of the traffic bureau. The general office which, prior to that time, had been at Chicago was moved to Washington, and the division office at New York was closed.

16747 Q. I don't remember whether you told us, Mr. Reiter, whether or not the freight rate service was

continued at this time or not; that and the statistical service?

A. The statistical service and freight rate service were both continued as before.

Q. Now you have told us this morning concerning the Institute's membership and activities and I believe you said that after the organization period in 1929 it engaged upon a period of activity up until July, I think you said, 1930, which you described and you said it had a dormant period then, I think, until 1933. Then it was revived for the purpose of proposing an N.R.A. code for the cement industry.

Then, after the code, you have told us about a period of retrenchment after that period.

What were the activities of the office you were in, the Chicago division? Were they substantially the same as the one you have described already in 1930, for instance?

A. Yes, sir. The division office of The Cement Institute in Chicago, their activities in the period immediately following 1933 were substantially the same as were the activities of that office in 1930.

Q. I see. Take, again, on the subject of contract reporting and checking in general. Did the Articles of Association provide for contract reporting?

A. Yes; specifically in Article 2.

16748 Q. Just what contracts were reported, Mr. Reiter?

A. All actually closed specific job and requirement contracts for the future delivery of cement.

Q. Was there any reporting or checking in connection with potential or anticipated contracts?

A. None at all.

Q. Was there any reporting or checking in connection with contracts for immediate sale of cement?

A. Well, if you mean by such contracts spot orders or any order for delivery within 15 days—

Q. That is what I do mean.

A. —there was no such checking.

Q. Approximately how much of total cement sold, in your experience, is covered by contracts requiring immediate delivery, Mr. Reiter, since you mentioned that.

A. It is, well, something over 50 per cent. It varies at times and in different parts of the country.

Q. And do you mean by that that specific job contracts were the only ones that were checked?

A. Specific job contracts and requirement contracts.

Q. Yes. You stated on your direct examination, Mr. Reiter, when the point was made, that the contract gave the customer a guarantee against price advance. I now ask you how much cement and for what uses is the guarantee against price advance given?

16749 A. The guarantee against price advance is as specified in the contract itself, either all or any specified part of the total requirements for constructing the specific work described in the contract.

Q. What is the reason, as far as any of the companies with which you have been associated, at least, what is the reason for their being unwilling to furnish to customers any amount of cement which the customers desired under a specific job contract?

16750 A. Well, in the case of a price advance they certainly would not desire to furnish any more cement at the specified lower price in the contract than the work described required, and that they were obliged to furnish.

Q. As I understand you, Mr. Reiter, because of this guarantee against price advance, the company was unwilling to furnish more cement than was called for in the contract.

A. Yes.

Q. Yes.

Now, as to the need for reporting and checking specific job contracts which you discussed on your direct examination, what are some of the ways by which buyers tried to get more cement than their contracts covered in your experience?

16751 A. Well, they might—they did intentionally, or unintentionally pad the contracts or buy an amount beyond that which was required for the job. They purchased the total cement required by the specific job from more than one cement company without the knowledge of the other cement companies and they covered through these contract requirements of specific jobs which did not, in fact, exist, or which had been completed and had no further cement requirements at the time the contract was entered into.

Q. You use the term "padding contracts," what did you mean by that?

A. Well, buying through one of these contracts more cement than was required by the specific work covered by the contract.

Q. How could they, if they could—how could these contracts be duplicated, Mr. Reiter?

A. A dealer could contract with one cement company for all the cement required by a certain job, and then, without the knowledge of the first cement manufacturer, buy the same total requirements from one or more additional companies and thus be protected in the case of a price advance for at least twice the amount of cement that the specific work actually required.

Q. Now, in your experience, Mr. Reiter, these practices, duplication and padding, these things that you have just described, what effect did they have upon the pro-
16752 duction schedule of the manufacturer?

A. Well, the commitments of any cement company necessarily have quite an effect upon their production schedule and, in the absence of accurate information, or reasonably accurate information, on commitments for the future delivery of cement, the cement company could not properly plan its production schedule.

Q. Mr. Reiter, would you tell us any effects that you have in mind that you were able to observe as to the results of your contract checking?

A. The results of such checking enabled the ce-
16753 ment manufacturers to whom reports were made to measure the worthiness of their own contracts and to measure the commitments which they showed on their own books. I think it did have the effect also of discouraging buyers from intentionally padding or imagining or duplicating contracts although—

Trial Examiner Norwood: In the case of that duplication when it is followed by a raise in price there was a price disadvantage to the manufacturer, wasn't there?

The Witness: He was—such cement as he shipped under this contract he shipped at the lower price in the contract, if that was lower.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. Now, as to the method of operating this contract reporting; how did the contract reporting operate, Mr. Reiter?

A. The members of each Cement Institute Division reported on forms provided each day all of their contracts closed that day and also on other forms provided for the purpose, reported any changes, increases, decreases, can-

cellations or completions of contracts already on file with The Cement Institute, and this information was disseminated to all members of the Division each day as received.

Q. And was the price reported?

A. The price was not reported.

Q. And what about the type of package?

16754 A. The type of package was not reported.

Q. And were these essentials to the problem of reporting contracts?

A. Not for the purpose of checking contracts. They were non-essential items.

Q. Mr. Reiter, did the manufacturer report all changes in the status of such contracts?

A. Yes. I have just stated that, Mr. Leisure.

Q. What I am coming to: Did that include the increase or decrease in the amount of cement? I mean, the change in expiration date, and the cancellations, and so forth?

A. Yes, sir. They reported all such items.

Q. The Commission offered in evidence some of these contract reporting forms: For instance, I have reference to Exhibits 1013-A, B, and C. Will you look at those, please (handing documents to the witness). Have you got 1013-C there? Did I give you that?

A. Yes, sir.

Q. How long was that used?

A. 1013-C is Cement Institute form No. 2-A, and was used only in the Northeastern Division and for a short time, and pertains to the changing of a specific sales order into a specific sales contract, as provided on its face.

Q. Now, will you take the first one, form 1, and just explain for the record how the forms were used; one and two.

16755 A. Exhibit 1013-A is Cement Institute's form No. 1, or a copy of it, and was the form used in reporting contracts closed by members to the Division office of The Cement Institute.

1013-B is a Cement Institute form No. 2, or a copy, and is the form on which a member reported to the Division office of The Cement Institute any change in his contract on file with the Institute office, such as cancellations, increases, or decreases, or completions.

Q. And was there a form No. 3, Mr. Reiter?

A. Yes, sir; form No. 3.

The witness identified Resp. Ex. 128 as Form No. 3 which was used at the time forms 1 and 2 were used.

16756 (RESP. EX. 128-A, 128-B, and 128-C was offered and received in evidence.)

Q. Will you look at form 3, Mr. Reiter, and explain whether or not it was used and accompanied any recommendations or suggestions as to how to handle these duplicated contracts that you have been telling us about?

A. Well, the information distributed on Cement Institute form 3 was merely copied from the forms shown by Exhibit 1013-A and 1013-B as received by the Institute office and no recommendation was sent to the members accompanying this report. It was sent, as you see it here, without any comment at all.

Q. Now, I have here in my hand Commission's Exhibits Nos. 1931 and 1932,—1931 being a letter to you by Mr. L-e-t-z-k-u-s, Letzkus, and 1932 being your reply to that letter. I would like to ask you whether or not the form that is referred to therein is form No. 3 which you have been discussing?

A. The form referred to in 1931 is Cement Institute Form No. 3 or that shown by Exhibit 128-A.

Q. You mean Respondents' exhibit?

A. Yes.

Q. Now, was it, and did you consider it as such
16757 as being any concern of the Institute whether or not member companies relayed information contained in the daily summaries to their salesmen?

A. No, it was no concern of The Cement Institute whether or not they did so.

Q. Well, were member companies obligated in any way to send on information contained in this form 3 to their men in their field?

A. They were not obligated to do so; no, sir.

Q. Did The Cement Institute have any authority in any way with reference to the contract obligations of its members?

A. No.

Q. Were code numbers used to indicate the name of the company?

A. Yes, sir.

Q. What was the reason for that, Mr. Reiter?

A. Merely for the sake of brevity and convenience.

16758 The witness identified Resp. Ex. 129 as a list of Code numbers and companies of the Cement Institute, under the date of April 24, 1935.

Q. I notice here on this Exhibit 128-A you have used a great many abbreviations and symbols there also; was this done because it was less expensive and easier, as you have already described?

A. Does your question mean this lefthand column here (indicating)?

Q. Yes. I mean, for instance, instead of writing out Pennsylvania-Dixie Cement Corporation, did you in your work find it less expensive and easier to write a code number and refer to that?

The Trial Examiner Norwood: I think you may let the witness give the testimony.

The Witness: Shall I answer?

Mr. Leisure: Does that explain my question?

Trial Examiner Norwood: Yes. Give your reason why you used this.

A. It was much more convenient to use the code number than the full name, or even an abbreviated name of the company referred to.

By Mr. Leisure:

Q. Were you following that practice in that exhibit when I see on the righthand side where you have
16759 used many abbreviations and symbols there instead of spelling out full names?

A. Yes, sir. In the lefthand column on this exhibit is first given the code number of the cement company who filed that contract and following that, after a vertical dash is the number of the contract, itself, as it exists in their files.

(RESP. EX. 129 was offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Reiter, were there any monthly reports on unshipped balances?

A. Yes, sir.

16760 The witness identified Resp. Ex. 130 as a form on which the members of the Institute reported the information to the Cement Institute. This was the source of the information which came into the Institute and from which it made its report to the members.

*Examination on Voir Dire.*

By Mr. Wooden:

Q. Mr. Reiter, I notice the columns in the paper, Respondents' Exhibit 130, headed "Destination and Location of Work," have been stricken out by lines drawn through them. Can you explain that?

A. Well, yes. The forms as originally prepared were marked "Destination and Location of Work," in the second column, and then it was stricken and made to read "Sold f. o. b."

In other words, these contracts were filed in our files alphabetically according to the destination and thereafter the town, or the point at which the cement was sold, was the thing that we wanted in the column and it seemed that this was clearer to the people from whom the information was solicited.

16761 Q. You didn't know, did you, what the destination was from the reports originally made?

A. Yes, sir, that was reported on the Cement Institute Form No. 1.

Q. Do I understand that the form without the columns that were stricken was used for a certain time and the form was used before that time without the columns being stricken, the headings of the columns?

A. Yes, but in both cases the same information was inserted in that column by the members.

Q. Can you say when that change took place?

A. I don't remember, Mr. Wooden.

(RESP. EX. No. 130 was offered and received in evidence.)

By Mr. Leisure:

Q. Now you have told us about the monthly compilation which was sent out and we have already seen the form by which it came to you. Did it show the details of the contract, cancellations, increases, and unshipped balances, Mr. Reiter?

A. Yes, sir.

16762 Q. Did the form show the total of unshipped balances by companies and by states?

A. Yes, sir.

The witness identified Resp. Ex. 131 as a form that the Institute used in sending the information out. It was

Cement Institute form 13, and was used for the Southeastern Division.

16763 *Examination on Voir Dire.*

By Mr. Wooden:

Q. To whom was the information contained in that exhibit sent, Mr. Reiter?

A. To all members of the Southeastern Division who reported contracts to the Cement Institute.

Q. Was it sent to any others than those?

16764 A. No, except that it was exchanged between division offices of The Cement Institute.

Q. Did it go to members who shipped into the Southeastern Division?

A. Yes, sir.

Q. But who were not members of the Southeastern Division?

A. Well, yes, because they reported their contracts also to that division.

(RESP. EX. 131-A to 131-S, both inclusive, was offered and received in evidence.)

The witness identified Resp. Ex. 132 as a Cement Institute form 13 for the Southeastern Division of a different date from that of the previous exhibit.

16765 *Examination on Voir Dire.*

By Mr. Wooden:

Q. What is the difference between this 132-A, etcetera, and the preceding number, Mr. Reiter, as to the character of information shown?

A. The preceding number was issued in 1930 and this one in 1936, and they are exactly the same except, I think, some added information was included in this issue that was not the practice in 1930, namely, this sheet (indicating).

Mr. Wooden: We have no objection other than to point out, Your Honor, it appears to be somewhat cumulative.

Trial Examiner Norwood: Do you have to put all of these in where there is practically no difference?

Mr. Leisure: He identified one, Your Honor, and I offered one that was used in 1930. We have already seen

what happened between 1930 and 1929 and 1936. Now, instead of offering all these between I merely offered the one at the end, 1936. I merely tried to shorten it all I could.

132-A is a report according to form 13.

By Mr. Leisure:

16766 Q. Isn't that true, Mr. Reiter?

A. Yes, sir; it is a report to the members. We, however, call that Cement Institute form 13.

(RESP. EX. 132-A to 132-KKK, both inclusive, was offered and received in evidence.)

The witness identified Resp. Ex. 133A-C as sample sheets of Cement Institute form 13 for the Chicago Division; Resp. Ex. 133-D as a different style of report called "classification of unshipped balances form" which usually accompanied or immediately followed the distribution of form 113; Resp. Ex. 133-E as another sheet or report, being classification of unshipped balances as
16767 of a different date. He was familiar with these at the time they were made and used; Resp. Ex. 134 A-2H as another form 13 for the Southeastern Division showing contracts on file as of October 31, 1935.

16769 Q. Mr. Reiter, after receiving these monthly reports, as you have already described, did you pass the information along to the members?

A. Yes, sir; in this Cement Institute form No. 13, of which we have just seen some forms.

Q. And those forms, such as the one that was offered in evidence, form 13, merely contains this information which you received, and you passed it along; is that correct?

A. That is correct.

Q. Now, as to the field of checking, we have been discussing the reporting of contracts. What was the purpose of the checking of these specific job contracts, Mr. Reiter?

A. To see whether there were any padded contracts, or imaginary contracts, or that had been filed with us, and to check the cement requirements of all contracts
16770 filed with The Cement Institute.

Q. And how was this contract checking done?

A. It was one by checkers or engineers who went into the field, and to the destinations where the work was going

on, and obtained their field information from those knowing about the contracts.

Q. Now, when this Chicago office was set up in 1930, on February 1, 1930, did the Chicago office have any specific job contracts outstanding?

A. There were—at the start of the Chicago Division, in 1930, there were several thousand specific job and requirement contracts filed with The Cement Institute at that office.

Q. Well, were all outstanding contracts in the Chicago office checked?

A. It was the intention to check all outstanding contracts, but there may be some of them, undoubtedly were some of them, completed before the checker got on the job.

Q. Now, the Commission offered in evidence an exhibit on this subject, No. 2198 and No. 2199. Do you recall now the subject matter of those two exhibits (handing papers to witness)?

(Mr. Wooden examines exhibits over the shoulder of the witness.)

A. Yes, sir; I do recall that.

A. Now, quite aside from the discussion in the 16771 letters, do you recall any circumstances, Mr. Reiter, covering the period, or, rather, covering the activity of borrowing salesmen for any purpose?

A. Yes, sir; it was at the start of the Chicago Division of the Cement Institute, in 1930, with these—with this initial mass of contracts on hand to be checked; it was impossible to do a prompt job of checking with any reasonable number of regular employees, so that salesmen were borrowed from various cement companies to aid in this work at that time.

Q. And you have already told us, I think, that with reference to those letters that Mr. Cabanis referred to there, the Respondent—

A. Yes, sir.

Q. —as a result of this correspondence, did he offer any salesmen?

A. Yes, sir; he did.

Q. How long a period of time did this work continue in that way, with these men, Mr. Reiter, if you recollect?

A. Well, these salesmen borrowed from cement companies were used in the Chicago Division each for a period of two weeks, and there were some 55 men so used.

Q. Was that a customary proceeding which prevailed throughout, or was that something that was just a temporary measure?

A. That was just done at the beginning, in the Northeastern Division, and the Chicago Division only, I believe.

16772 Now, how did you proceed, as far as determining the territory to be covered by the salesmen, in doing this work?

A. Well, we gave checking territories to company salesmen other than those in which they traveled on their own company's business, so that they would not be familiar with contracts in that territory, and would check them from a disinterested standpoint and get the full facts.

16773 The witness identified Resp. Exs. 138, 139, 140, 141 and 142 as forms of the Cement Institute concerned with the checking and reporting to members all the information collected in the field by the checkers. ~~Resp. Ex.~~ 138 as Cement Institute form No. 4, a form by which a member of the Institute could request a checking of a competitor's contract, giving certain information which he had on that contract and which he thought might be of interest in connection with the check; Resp. Ex. 139 as Institute form No. 5, a form given to the field checker at the time he was requested to check the contract. The information above the double line on the face of the form was filled out in the office and he was required to investigate the contract and to supply such information indicated below that line as he could; Resp. Ex. 141 as the Cement Institute form No. 7 and the report form which the Institute reported to members information collected in the field by the checkers; Resp. Ex. 142 is a Cement Institute form No. 6 and was the form on which the Cement

16774 Institute reported to a member the information collected in the field on a competitive contract about which he had requested information; Resp. Ex. 140 as Cement Institute form No. 8 "and in all cases in blank accompanied reports on forms"; Resp. Exs. 141 and 142 were used by those receiving the report to indicate whether or not they agreed with the check of the Cement Institute or desired other information developed.

16774 Trial Examiner Norwood: In case where it is found that there was duplication, what did the Cement Institute do about it?

The Witness: They did nothing except to report whatever information the field engineer checked in the field; sometimes a check, Your Honor, would tell him that he purposed to use a certain brand of cement. When that was told him he reported it to us and we reported it to all members owning contracts duplicated on that job.

Trial Examiner Norwood: Reported it to the members who had the contracts?

The Witness: That is right. We reported jointly
16775 in the case of a duplicate contract to all members having a contract on that job.

Mr. Wooden: May I ask a question or two?

Trial Examiner Norwood: Certainly.

*Examination on Voir Dire.*

By Mr. Wooden:

Q. As of what date were these various forms used?

A. There has been no material change in any of those forms during any contract checking period under the Cement Institute.

16776 (RESP. EXS. 138 to 142, were offered and received in evidence.)

Trial Examiner Norwood: On receiving this information did you note that anybody besides the two
16777 parties concerned had the contracts; two or more parties?

The Witness: No, sir; in the majority of cases there was only one party concerned; that was the party who owned the contract.

Trial Examiner Norwood: If it was a duplication there would be bound to be two?

The Witness: In duplicated contracts we notified all who had duplicated contracts on that particular work.

Trial Examiner Norwood: If any other member requested the information wouldn't they get it?

The Witness: Yes, sir; pertaining to any contract on file when we checked that and in that case the member owning the contract got a report on Cement Institute Form No. 7, and the member requesting the information on a competitor's contract got the same information on Cement Institute Form No. 6.

By Mr. Leisure:

Q. Mr. Reiter, you have been discussing duplication with His Honor. Will you explain to him your experience as to whether you found much duplication or was the principal trouble with padding? Will you explain that situation fully?

A. Well, ordinarily only a small percentage of contracts are duplicated. As I say, most of the information developed which resulted in cancellation or partial
16778 cancellation of contracts was in padding or in imaginary or completed contracts which we found in the field, but we checked all contracts whether or not any objection was offered to them by any member, or whether or not any request was made for a special checking, and the majority of them we found to be entirely justified.

16779 Q. Now, in that connection, I show you Commission's Exhibits 1017-A, B, and C, and ask you whether or not they have any relation to the exhibits which you have just been discussing, which are now Respondents' Exhibits 138, 139, 140, 141, and 142 (handing paper to witness).

A. Yes, sir; they are reports of The Cement Institute, Commission's Exhibit 1017-C is a report on Cement Institute form No. 6, being Respondents', Exhibit 142, to a cement company who had inquired regarding a competitor's contract on Cement Institute form No. 4, being Respondents' Exhibit No. 138.

Federal Trade Commission's Exhibit No. 1017-B is a return of Cement Institute form No. 8, being Respondents' Exhibit No. 140.

And Commission's Exhibit No. 1017-A is a report to the member on Cement Institute form No. 7, being Respondents' Exhibit No. 141.

Q. And, as I understand you, there are five forms in a complete set, forms 4 to 8, inclusive?

A. Yes, sir.

Q. Now, as the result of this contract-checking, Mr. Reiter, were any contracts, in your experience, actually canceled?

A. Many contracts were canceled in whole or in part.

Q. And, as far as the Northeastern Division is concerned, what was your experience there?

A. The manager of that division made a report
16780 in which he stated that from the time they opened in October—opened this activity in October, 1929, until April 1, 1930, six million barrels of over-estimated cement was canceled.

Q. And what was your experience with respect to the Chicago Division?

A. During the year, the entire year 1930, 7½ million barrels of over-estimated cement was canceled.

Q. Now, was there any report to the members in 1930?

A. Yes, sir.

Q. That is the one you have just described?

A. Yes, sir; I always made an annual report.

Q. I want to show you that.

The witness identified Resp. Ex. 143 A-D as the
16781 annual report of Mr. McConnell, the General Manager of the Cement Institute, dated November 1, 1930, and addressed to the members of the Cement Institute.

(RESP. EX. 143-A, 143-B, 143-C, and 143-D were offered and received in evidence.)

16781 The witness identified Resp. Ex. 135 A-8P as form No. 13, as of May 31, 1936, of the Chicago Division, distributed to the membership; Resp. Ex. 136 A-5L as a Cement Institute Form No. 13 as of October 31, 1935, pertaining to the Northeastern Division and distributed
16782 to members of that Division; Resp. Ex. 137 A-60 as the Cement Institute form No. 13 as of February 29, 1936, of the Northeastern Division distributed to members of that Division.

Q. When this contract-checking activity of the Institute showed duplications as you have described did the Institute do anything to attempt to prevail upon the members to cancel or adjust their contracts?

A. Not at all.

Q. If two members had duplicate contracts did the Institute indicate which one of them should be canceled?

16784 A. Not at all, so far as I know.

16786 Q. Mr. Reiter, will you start in at the beginning and tell us from the time that you were with the Institute all actions that it ever took at any time with regard to cancellation of contracts?

16787 A. The Cement Institute, to my knowledge, took no action of any kind to coerce or persuade any mem-

ber of the Institute to either cancel or refrain from canceling any contract.

16790 Q. Is the exhibit which you hold in your hand the one that Mr. Wooden asked you about on direct, —did that come out of your office?

A. Commission's Exhibit No. 1015-A did.

"Q. Now, Mr. Reiter, when you were testifying on direct, Mr. Wooden called your attention to Exhibits 1015-A to D and asked you whether the Institute ever told its members that they were under no obligation to furnish cement? Let me show you this exhibit to refresh your recollection.

I now ask you whether you did notify them one way or the other as to whether or not they had any obligation to fill the contract?")

Trial Examiner Norwood: Objection overruled.

A. In this report to a member on Cement Institute form No. 7, we did say that we saw no obligation

16791 under the contract upon which we were reporting because our investigation in the field showed that the work described in the contract was completed and also that another contractor had done the work than the one that they had specified as doing the work in their contract.

16792 Trial Examiner Norwood: And he had already shipped on that contract and you told him he needn't ship any more; after investigation you told him he needn't ship any more, is that right?

The Witness: Inasmuch as his contract covered this specific job and we found it was completed, we said that we saw no obligation under his contract.

Trial Examiner Norwood: Was that from the Chicago Division?

The Witness: Chicago Division of the Cement Institute.

Trial Examiner Norwood: Yes; all right.

By Mr. Leisure:

Q. Now, with regard to the suspension of contract reporting and checking which you also covered on your direct examination, you have testified that the Institute started a checking of specific job contracts, I believe, in 1929 and 1930. Did the Institute continue its work in this contract reporting and checking up to the present time, Mr. Reiter?

A. No, sir.

Q. What happened?

A. Contract reporting and checking was stopped the first time on April 1, 1931; revived again in 1933, and stopped in October of 1936, and has not yet been revived again.

Q. In your experience either as a manufacturer
16793 or in the Institute, is there any reason for its not being revived?

A. I would like to see it revived. I think it is a good thing.

Q. Can you say whether or not the work already done by the Institute with respect to checking contracts tended to discourage these duplications you have described?

A. I think they did, undoubtedly.

Q. Does that also cover the term—I think you used—"padding"?

A. Yes, sir, it also discouraged padding.

Q. And does it also cover fictitious contracts which you have described?

A. It discourages the covering of fictitious contracts, also.

Q. Now, during this N.R.A. Code period was the Institute then engaged in contract reporting?

A. Yes, sir.

Q. And was the filing of prices with the Code Authority distinct from the Institute's activities concerning specific job contract reporting?

A. Entirely so.

Q. You told us, Mr. Reiter, that the purpose of contract reporting was an effort to determine the true status of contracts filed and the bona fide nature of a specific job. Could a contract be checked if the destination
16794 were incorrectly reported?

A. No, sir, it could not be checked.

Q. And was the destination price of a given job included in this contract reporting?

A. No, it was not.

16796 Washington, D. C.,
March 1, 1939.

16803 GEORGE H. REITER thereupon resumed the stand and testified further as follows:

*Cross-Examination (Continued) by Mr. Leisure.*

Q. Mr. Reiter, when Court adjourned yesterday, we were discussing the subject of contract checking. I would like to direct your attention this morning to Commission's Exhibit No. 1016 which is a letter dated May 1, 1934, written by the chairman of the Code Authority to Mr. Harold Cree, salesmanager of the Aetna Portland Cement Company.

"Please refer to our letter of January 29 and your reply of February 1 regarding delivery on your contract 55, line 34452, sold f.o.b. Dearborn, Michigan.

16804 "You are hereby notified that formal complaint has been filed against you by a member of this industry charging a violation of Article 10, Section 3 of the Cement Code and also charging a violation of Article 9, Section 1, of the Cement Code."

Did that letter have any connection with contract checking, Mr. Reiter? Will you look at it, please? (Handing document to the witness.)

A. Well, this was, of course, a case where the Code Authority was notifying a member of the Industry of a complaint filed against him and the charge was that he had, in effect, sold cement at a destination other than the correct destination, the destination required for that work, for the purpose of selling at less than his own filed price at destination.

Therefore, apparently, the Code Authority inquired as to what destination the sale was actually made so that they could determine whether a violation of the open price filing had occurred.

Q. Well, now, did the N.R.A. Code which was approved November 27, 1933, have any provision with reference to contract checking as a Code Authority function?

A. No, it did not, Mr. Leisure.

16805 Q. Now, Mr. Reiter, as to this amended code which I think you said became effective May 21,

1935; was there any specific contract filing provided for in that code?

A. Yes, there was, in that code.

Q. What were the circumstances, if you know, Mr. Reiter, under which such provisions were included in the amended code?

A. In spite of the checking of contracts by the Cement Institute there was a strong possibility, almost a certainty, that cement was being taken from contracts for use in dealer warehouse business and if the price had increased that would have defeated the open price provisions of the Code.

Therefore, the new Code provided for contract filing as an aid in indicating whether the open price provisions of the Code were observed or not.

Q. You said that it was provided for: Did it go into effect? Was it used?

A. It was in effect only 6 days before the Schechter decision.

Q. Now, prior to the N.R.A., was there any provision for any statistical service for members?

A. Yes, sir.

16806 Q. Where was that provision found?

A. It was provided by Article 2 of the Articles of Association.

Q. When was that service instituted, Mr. Reiter?

A. It was instituted on or about January 1, 1930.

16807 The witness identified Resp. Ex. 144 as the form upon which members of the Institute reported their own monthly statistics on clinker production, cement production, cement shipments and stocks on hand; Pet. Ex. 145 as the form upon which members reported to the Cement Institute cloth sack returns; Resp. Ex. 146 as the form upon which information received from the members was tabulated and sent to members, such information covering production, shipments and stocks on hand; Resp. Ex. 147 as the form upon which cloth sack information received from members was tabulated and sent to all members of the Cement Institute.

Q. Was this service, Mr. Reiter, in any way similar to any other service, to your knowledge?

A. At that time—

Mr. Wooden: Any other service?

Mr. Leisure: Yes.

Mr. Wooden: Do you mean in any other industry, or any other service in this industry, or what?

By Mr. Leisure:

Q. Well, was it similar to the U. S. Bureau of
16808 Mines, to be exact, Mr. Reiter?

A. The U. S. Bureau of Mines collected information on production, shipments, and stocks on hand for the cement industry, distributed generally.

Q. Well, then, what were the reasons, or the circumstances, under which the Institute undertook this service?

A. The reports from the U. S. Bureau of Mines took a long while before they were ready for distribution, and before the members of the cement industry received them, and they wanted such information more promptly, and that was the reason that this reporting by the industry was made.

(RESP. EXS. 144, 145, 146 and 147 were offered and received in evidence.)

By Mr. Leisure:

Q. Now, will you explain, Mr. Reiter, the character of this service, whether or not it was purely mechanical or just explain what it consisted of, please.

16809 A. Well, it merely required the tabulation of information received by the office, and the work was performed by a clerk in the office.

Q. To that extent it was mechanical; is that correct?

A. Yes.

Q. Do you know whether or not the Institute attempted to make any interpretation, or to draw any conclusions with respect to this date?

A. They made no such attempt.

16811 Q. All right, Mr. Reiter.

Were you employed at any time by any manufacturer of cement prior to the time that you became connected with the Institute?

A. Yes, sir; some years before that.

Q. And, in what connection, was your experience
16812 such that you were in a position to see figures of this character when they came in?

A. No, sir.

Q. Were you in that position at any time when you were connected with the Universal-Atlas Company, so that you

were in a position to determine whether or not this service was of any benefit to your company?

A. I am—

Q. Yes?

A. —now in that position.

Q. Yes.

Now, Mr. Reiter, will you tell us, if you know, whether or not these figures are of any service whatever in checking a company's sales force?

A. They are of great service, and I use them constantly to compare figures of our own sales with figures of the previous year, and to determine whether additional sales efforts are needed in certain territories, or not.

Q. Now, when you saw these figures, will you explain whether or not they showed the trend of the market in any direction in any way?

A. Well, they would, of course, inasmuch as increases over the previous month, or over the same month, in the previous year, would show a more active market, and decreases would, of course, show a declining market.

16813 Q. Yes.

A. And such information might cause a cement manufacturer, and has, in fact, caused me to increase or decrease our sales force of the Universal-Atlas Company in certain territories.

Q. I think you mentioned, Mr. Reiter, that the articles of association also provides for collection and dissemination of information concerning cloth sacks returns.

A. Yes, sir.

Q. Was this service undertaken by the Institute on any particular kinds of forms?

(Witness referred to Respondents' Exhibits 145 to 147, inclusive.)

A. The collection was on form shown by Respondents' Exhibit No. 145, and the dissemination was on form shown by Respondents' Exhibit 147.

Q. And are those, as you have referred to them, Institute forms Nos. 10 and 12,—is that the printing on the body of the document, Mr. Reiter?

A. The first is Cement Institute form No. 10, and the second referred to is Cement Institute form No. 12 (referring to exhibits).

16814 Q. Now, as to this information concerning cloth sack returns, what, if anything, has been your expe-

rience as to whether this service is of any benefit or gives any additional information to the manufacturer?

A. My experience is that credit for cloth sack returns may be, and is, in cases, used as a secret rebate or discrimination between customers.

16815 Q. Mr. Reiter, on this subject of statistical service, what, if you know, was the status of these various institute's statistical services during the so-called dormant period of the Cement Institute which you described yesterday?

A. They all were discontinued on April 1, 1931.

Q. And what were the circumstances surrounding this suspension of activity?

A. The membership in the Institute had become so reduced that the statistics collected from those remaining were not representative of conditions in the industry.

Q. Now, prior to the N. R. A., how long did the statistical branch of the Institute's service remain inactive?

A. It remained inactive from April 1, 1931, until 1933 and in the fall of that year, I don't remember the exact time.

Q. Does that include the information that you have just been discussing this morning, such as information concerning cloth sacks?

A. The information on cloth sack returns has never been revived since April 1, 1931.

Q. You mentioned Mr. Mallory's service. Did that compare in any way with the former service?

A. In 1933 Mr. Mallory conducted the collection and dissemination of production shipments and stocks on hand statistics for the Institute, and it was quite similar to the information formerly collected by the Institute in 1930.

16816 Q. I think you have already said, or at least I will ask you now, was Mr. Mallory first employed by the Institute in 1933?

A. That is correct.

Q. I think you have already told us that.

Do you know, Mr. Reiter, whether, in addition to this so-called Mallory service, any of the division offices resumed publication of statistics?

A. The Kansas City Division resumed the collection and publication of statistics on production shipments and stocks.

Q. And for how long a period of time was that, if you know?

A. It is my impression that it continued until some time in 1936.

16817 The witness identified Resp. Ex. 148 as to form by which the present statistical bureau of the Cement Institute receives information on production shipments and stock on hand from the members of the Institute; Resp. Ex. 149 A-G as the so-called "tenth of the month report", by which the information received on the report is disseminated to members of the Institute.

Q. You have mentioned the Mallory service both on direct and cross examination. Now you mention certain reports prepared by Mr. Mallory. Just what are they?

A. Well, this is one, the "tenth of the month report." There are four additional reports, all of which are based on information furnished by the U. S. Bureau of Mines. They include mill net returns for various divisions of the United States, percentage of capacity utilized, days' supply of finished cement on hand, and statistics on dollar value of construction contracts.

16818 (RESP. EX. 148 and 149-A to G were offered and received in evidence.)

By Mr. Leisure:

Q. Have you told us the period of time during which those were used, Mr. Reiter?

A. Both forms have been used since Mr. Mallory was in charge of the statistical bureau of the Cement Institute except that there may be some minor changes in the form shown by Exhibit 148. However, there have been no substantial changes.

Q. And so that the record will show, you have 16819 now been referring to Respondents' Exhibit 148 and 149?

Mr. Wooden: Does the record show when Mr. Mallory became the statistician?

The Witness: I said in 1933, the latter part.

The witness identified Resp. Ex. 150 as showing the percentage of capacity utilized by districts of the United States; Resp. Ex. 151 as a monthly report showing 16820 the number of days' supply of finished cement in stock for each division in the United States; Resp.

Ex. 152 as a quarterly report showing the average factory value per barrel of cement shipped for each Bureau of Mines' district in the United States by years, the unfinished portion of the current year, in each case, being estimated; Resp. Ex. 153 A-C as the information on contracts awarded with the dollar value for the current and previous three years divided by Bureau of Mines' districts and covering the first eight districts only, of the United States. These four reports were based on reports issued by the United States Bureau of Mines.

Q. Were the exhibits you referred to a moment ago, 148 and 149, also based on that source?

A. No, sir. This "tenth of the month report", Respondents' Exhibit 149-A (was based on information received directly from members of the Institute on the form shown by Respondents' Exhibit 148.

Q. And was this the only Mallory report based on industry figures, Mr. Reiter?

A. Yes, sir; that is, Respondents' Exhibit 149—

16821 Q. Yes.

A. —149-A to G was the only report based on figures received direct from reports of the industry.

16822 Mr. Paulson: I would like to inquire, where the witness uses the past tense—the testimony is, I believe, that the statistical service is still running. Is that just a slip, or statement on the part of the witness, or—

Mr. Leisure: Suppose you clear that up, Mr. Reiter.

Trial Examiner Norwood: Yes.

A. The past tense, Mr. Paulson, is due to the fact that I am not now with the Cement Institute, I suspect, and these reports that I have described are all continued up to the present time.

Mr. Paulson: I see.

Mr. Leisure: I would like to offer the Respondents' Exhibits, for identification, Nos. 150 through 153 (handing documents to Counsel).

Mr. Wooden: Might I ask you a question—

Trial Examiner Norwood: Certainly.

Mr. Wooden: —on voir dire?

Trial Examiner Norwood: Certainly.

*Examination on Voir Dire by Mr. Wooden.*

Q. The initials "W. S. M." that appear on each of these Exhibits 150 to 153-C, are those the initials of Mr. Mallory (referring to Respondents' Exhibits 150 to 153-C)?

A. Those are the initials of Mr. Mallory.

16823 Q. And when you referred to them as "Mallory Exhibits," you meant they were the work of Mr. Mallory?

A. Yes, I meant that he was the head of the Statistical Bureau which issued these reports.

Q. Yes.

(RESP. EX. 150, 151, 152, 153-A, 153-B, and 153-C, were offered and received in evidence.)

By Mr. Leisure:

Q. Now, Mr. Reiter, I would like to direct your attention to Commission's Exhibits 1025 and 870-HHHHHH (showing documents to the witness). I notice that the Exhibit 1025-I is a letter signed by yourself and Exhibit 870-HHHHHH is from Mr. Sunderland.

Will you look at them and tell us whether or not these are connected in any way with the 10th of the month reports that you have just been describing?

(Mr. Zimmerman examines exhibits over the
16824 shoulder of the witness.)

A. Yes, sir; both of these exhibits refer to the so-called 10th-of-the-month reports.

Q. Well, were these objections, such as referred to in the exhibits—were these objections to the 10th-of-the month reports numerous, Mr. Reiter?

A. Far from it.

Q. Were members ever required to supply these figures?

A. No, it was entirely a voluntary matter.

Q. Now, take the N. R. A. Code or the Code Authority, did it ever require members of the industry to supply such statistics?

A. No, it did not.

Q. Did the Institute ever indicate any manner in which the members should use this information?

A. No, they did not.

Q. I notice that on this exhibit—

Mr. Paulson: Your Honor please—

Q. —870—excuse me.

Mr. Paulson: I just want to know whether the record shows which exhibit is the 10th-of-the-month report? It may do so, I do not know that it does. Which exhibit is it?

Mr. Leisure: I examined that, Mr. Paulson.

Mr. Paulson: Which exhibit is it?

16825 Mr. Leisure: Respondents' Exhibits 149-A to G.

Mr. Paulson: All right; thank you.

By Mr. Leisure:

Q. I notice on this Exhibit 870, reference is there made to the possible misuse of such statistics. What has been your experience with reference to that?

A. I don't know of any misuse of the statistics.

Q. Were statistics in this form collected and distributed by the Cement Manufacturers Protective Association, if you know?

A. Substantially in this same form.

16830 Q. Mr. Reiter, I don't recall whether I asked you, I don't believe I did, whether there had been any change in the Mallory service since its institution in 1933.

A. There has been no change in that service.

Q. I would like to call your attention to the Commission's Exhibit 204.

Mr. Leisure: That was discussed, Mr. Wooden, on page 4422 and up to page 4426.

By Mr. Leisure:

Q. This exhibit is 204-L, M, N, and J; do you remember those letters (handing document to the witness)?

A. Yes, sir, I remember this correspondence.

Q. Would you explain the circumstances to the Examiner?

A. The Bureau of Labor Statistics Wholesale Price Division of the United States Department of Labor had for years collected statistics on the wholesale price of cement, and they were interested in improving the figures so collected and distributed.

The information which they had collected and reported was the so-called price base at some six mills in the United States, and they discussed with me, as secretary or chairman of the Code Authority, the possibility of changing

those statistics to the price filed at representative cities of the United States.

Q. I want to show you Commission's Exhibit
16831 933-RRRRR, and 933-SSSSS, and ask you whether or not this exhibit related to the same transaction which you have just described.

Mr. Leisure: The exhibit is just marked for identification 933-RRRRR and 933-SSSSS and not received in evidence. I thought they were received.

A. Yes, sir, this Commission's Exhibit, for identification, 933-RRRRR and 933-SSSSS does refer to the same matter as that considered in the correspondence of the previous exhibit.

16832 (RESP. EX. 154-A and 154-B were offered and received in evidence.)

16833 Q. Mr. Reiter, when you were testifying a moment ago and said that certain exhibits referred to Commission's Exhibits 204-J, L, M, and N, you were then referring to what is now Respondents' Exhibits 154-A, B (handing documents to witness).

A. Yes, I was referring to such exhibits.

Q. Now, a moment ago you told us of certain figures having come from the Bureau of Mines, with respect to some of the exhibits that we were discussing.

Will you tell us what the source was for Respondents' Exhibit 153-A, please?

A. The source of the information for this exhibit was the F. W. Dodge Statistical Service.

Q. Now, again referring to this correspondence, Commission's Exhibits 204-J, L, M, and N, and Respondents' Exhibits 154-A and B, which you said referred to the U. S. Bureau of Labor Statistics,—what, if anything, was your interest in that, Mr. Reiter?

A. Well, my interest was to have the Bureau of Labor Statistics disseminate more accurate information on prices which existed on Portland cement.

Q. Now, with reference to this Commission's Exhibit
204-L (handing document to the witness), has the Institute ever taken any steps in connection with the Bureau
16834 of Mines concerning rated capacity?

A. I doubt it very much.

Q. Has it, to your knowledge?

A. It has not, to my knowledge.

Q. Now, on both direct and cross-examination you made

some mention of another activity, namely, the Credit Bureau. I think you testified that The Cement Institute had the collection and dissemination of credit information as one of its activities.

16835 Q. Mr. Reiter, suppose you tell us now whether The Cement Institute did collect and disseminate any information of a credit character?

A. It did; yes, sir.

Q. What, if you know, was the extent of this activity?

A. Early in 1930 the Chicago Division by vote of its members started to collect information on past due accounts in The Cement Institute and disseminate such information monthly, and this activity was continued in the Chicago Division until the latter part of that year, possibly October, and then abandoned.

The information so collected monthly from members was tabulated on a form provided for that purpose, in alphabetical order, according to towns, and the whole report was disseminated to all members who had contributed their own information.

16840 Q. Mr. Reiter, I show you Respondents' Exhibit, for identification, 155-A to V, and ask you to explain for the record what it is.

A. This exhibit, Respondents' Exhibit 155-A to V is a report of credit information of the Chicago Division dated December 30, 1930, and sent to members as of that date.

16842 (RESP. EX. 155-A to 155-V, both inclusive, was offered and received in evidence.)

Q. Mr. Reiter, what is the present status of the credit service?

A. There is no reporting or dissemination of credit information at this time.

Q. Now, take up the freight rate service, Mr. Reiter.

Mr. Leisure: Page 3154 of the record is where it starts, Mr. Wooden, on direct.

By Mr. Leisure:

Q. Is there any provision for freight rate service
16843 in the articles of association of The Cement Institute, Mr. Reiter?

A. It was not provided for specifically although it might be considered provided for by a general articles under the stated purposes in Article II.

Q. You are now talking, I presume, as of 1929 and 1930?

A. I am talking of that date.

Q. Do you know why the freight rate service was not included in these original articles and original purposes of the Institute, Mr. Reiter?

A. At that time that The Cement Institute was organized they had a commercial agency located at Washington which was supplying freight rate information to members of the industry in the East, at least, for a fee.

Q. Do you mean there was some other agency that was selling its service?

A. Yes, sir; this freight rate service.

Q. It was a private, independent agency?

A. That is right.

Q. What is the name of it?

A. National Traffic Bureau, I believe.

Q. Is that the same one that is sometimes referred to as the Young Bureau?

A. Yes, Mr. Young was the head of that Bureau.

Q. Now, did it continue, Mr. Reiter, to serve the purposes of the industry?

16844 A. No, it did not, and shortly after The Cement Institute was formed the service furnished by this Bureau became entirely unsatisfactory to members of the cement industry.

Q. I would like to direct your attention to Commission's Exhibits 136-SS and 136-TT, which is the minutes of a meeting of the Board of March 14, 1930 (handing documents to the witness).

Will you tell us, Mr. Reiter, to what extent this situation was discussed at Institute meetings?

A. The matter was rather fully discussed at the meeting covered by these minutes, and discussion was to the effect that the service supplied by the National Traffic Bureau was incomplete and inaccurate, and by resolution the president of The Cement Institute, and the general manager, were authorized to investigate the condition of this National Traffic Bureau and to take steps, if they deemed it advisable, to establish a freight rate service within the Cement Institute.

Q. What action was taken as the result of that, if anything?

A. Freight rate bureaus were established in The Cement Institute shortly thereafter.

Q. Will you outline to the Examiner the manner in which the Institute first published freight rates for cement?

16845 A. Traffic bureaus were established with offices at Bethlehem, Pa., and Chicago, Ill., and at Kansas City, and they attempted to publish, and did publish, as promptly as possible, freight rate books for all States covered in other respects by those—by the Northeastern, Chicago, and Kansas City Divisions. Exceptions to this were the fact that one book was published by the Bethlehem Bureau for the New England States, and one book was published for Maryland, the District of Columbia, and Delaware.

The original books were prepared by comparing freight rate books of individual members with the tariffs, and contained as headline points, in substantially all cases, about the same number, or the maximum number, of headline points that were contained in any members' books. These headline points were increased in number from time to time.

By Mr. Leisure:

Q. Was there ever any freight rate bureau established at Kansas City?

A. Yes, sir.

Q. What about the Northeastern and Southeastern Divisions?

A. The Northeastern and Southeastern Divisions' freight rate service was handled out of the Bethlehem, Pa., office.

16846 Q. What States were included, Mr. Reiter, in the rate books published by the Northeastern Division, if you know?

A. All States in the Districts 1 and 2.

Q. What States were covered by the books published by the Chicago Division?

A. All States within Districts 3, 4, 5, and 7.

Q. Do you know what States the Kansas City service covered?

A. All States within District 8.

Q. How was the Chicago Division rate service financed?

A. It was financed by special dues for that purpose; in other words, there was an increase in the special dues already assessed for the year at the time when the freight rate service was instituted.

Q. Do you know how this cost compared with the Bethlehem Bureau?

A. Approximately the same.

Q. Has the cost of this service to members ever varied?

A. Yes, it did.

Q. When and under what circumstances, and what were the reasons?

A. Well, the principal reason for fluctuation in the cost of the freight rate bureaus is due to the necessity, periodically, of reissuing the freight rate books in more normal numbers.

Q. Had you finished your answer, Mr. Reiter?

16847 A. I had finished, yes.

Q. I notice that in this Commission's Exhibit 137, on page D, Mr. Reiter, it is stated that the cost is about three-tenths mills per barrel, these being minutes of a meeting as indicated by the exhibit.

Does that coincide with your recollection and experience on those matters?

A. Yes, that was the original amount of dues assessed for this purpose in the Chicago Division.

Q. Now, how did the cost of service through Institute books compare with the cost to the individual company maintaining its own service, if you know?

A. Any collection of its own service would—

Mr. Wooden: Your Honor—

Trial Examiner Norwood: Yes.

Mr. Wooden: —I object to the witness stating any theories about the thing. If he has some experience of his own that will enable him to answer the question, I do not suppose there would be any objection to it, but if he is just frankly stating a generalization, or a theory about a company, as he started to state, that such and such would be the case, it is nothing but an argument.

Trial Examiner Norwood: Well, I suppose—

Mr. Leisure: You confine it to your own knowledge and your own experience as to what you have observed.

16858 Trial Examiner Norwood: The testimony shows that this witness dealt directly with that subject, and if he investigated, and he can give us any factual information about it, he may do so.

I shall instruct him to make his answer factual.

Mr. MacIntyre: That will be acceptable, Your Honor please—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —for him to give any facts as to the actual cost—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —of companies engaging in this business; but as to summarization or conclusions, of course we consider that objectionable. We want facts.

Mr. Leisure: Answer, please, the question I gave.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: As the Examiner amended it.

A. I can readily reply to that question through the experience of my present company, the Universal-Atlas Cement Company, who did for a number of years publish their own freight rate books.

16850 A. Of my own knowledge, therefore, the traffic department of my own company would be to no less an expense in issuing their own freight rate books than The Cement Institute Traffic Bureau was in issuing the same books, because the same work must necessarily be done. Therefore, having the traffic Bureau of The Cement Institute do this one sufficed for all who used that service, and it seems to be apparent that a considerable amount of money in the preparation of freight rate books was thereby saved for the industry.

16852 Q. After the revival of the Institute, Mr. Reiter, at the beginning of the N.R.A., as you have described, do you remember whether or not the territory covered by the Institute rate service was increased or decreased in any way?

A. The territory covered by the Institute freight rate service was increased by the addition of two States, namely, Texas and New Mexico.

Q. Which rate bureau issued these books?

A. The Chicago Rate Bureau.

Q. Was any service provided for Districts 11 and 12?

A. None at all, nor for any other part of District 10 than the State of New Mexico.

Q. Will you explain to the Examiner why this was?

16853 A. The members of the Institute in those districts never requested such service, and that is all I know about it.

Q. Yes.

Was this freight rate service, this activity in the Institute, ever suspended?

A. No, sir; it has never been suspended since it was started in 1931—1930.

Trial Examiner Norwood: Is it in use today?

The Witness: It is in use today; yes, sir.

By Mr. Leisure:

Q. I think you have already told us that there were certain sections, Mr. Reiter, when the members did not contribute and they did not have that service in the Rocky Mountain section,—didn't you tell us?

A. Yes, I did say so.

Q. Now, you have mentioned certain headline points. First of all, will you tell us what you meant when you used the language "headline points"?

A. The words "headline points," as referring to these freight rate books, means points of shipment for cement as shown in the books, and are referred to as headline points, because they appear in the headline column of the book.

Q. You mean above the line at the head of the page, Mr. Reiter?

A. Yes, sir.

16854 Q. How were the shipping points determined?

A. Originally, as I said, they consisted for most States of the headline points or the maximum number of headline points shown in the books issued by individual members and available to The Cement Institute for checking at the time they started this work. They were constantly increased in number until at the present time they include as headline points all points of shipment from which any appreciable amount of cement moves into the territory covered by the book.

Q. Now I would like to direct your attention to Commission's Exhibit 1005. I believe you testified that you might have inquired as to whether or not Wabash was interested in having freight rates from Stroh, S-t-r-o-h, published and that it was not, since it trucked from that plant.

I note that this exhibit, which is a letter from Mr. Jennings of Wabash Company directed to you, dated July 24, 1930, refers to Wabash's decision not to make Stroh a truck base (handing document to the witness).

Will you look at that letter, please, and tell us was it the practice of the Institute with respect to confining the publication of rates, to limiting them in any way to basing points?

A. Not at all.

16857 Q. Mr. Reiter, were you the manager of the Chicago Division when it issued its first freight rate books?

A. Yes, I was.

16858 The witness identified Resp. Ex. 156 as the Indi-
16859 ana rate book No. 1 issued by the Chicago office of The Cement Institute; Resp. Ex. 157 as the Indiana rate book 1A issued by the Chicago office of the Cement Institute.

(RESP. EX. 156 and 157 were offered and re-
16860 ceived in evidence.)

By Mr. Leisure:

Q. Mr. Reiter, do you know why book 1 was issued without rates from all the points?

A. For the purpose of getting rate information into the hands of the members of the Institute as promptly as possible. Therefore, it was issued before taking sufficient time to check rates from all headline points from which an appreciable amount of cement was shipped into the State of Indiana.

Q. What points did that include?

A. I know Rate Book 1 included rates from the following headline points, Buffington—

Q. Mr. Reiter, I did not mean to read from the book. I mean I wanted to know how the selection is made.

A. The selection was made using the maximum number of headline points that existed in any book issued by a member company or a combination of such members' books.

Q. When did you publish book No. 1-A?

A. In October, 1930.

Q. And was there ever any proposal to re-issue any of these rate books in 1933?

A. Oh, yes, and they all were re-issued in 1933.

Mr. Leisure: I would like to have these marked for identification.

(The documents referred to were thereupon
16861 marked for identification as Respondents' Exhibits 158-A to 158-V, inclusive, 159-A, and 159-B.)

*Cross Examination by Mr. Leisure.*

The witness testified in reference to Resp. Exs. 158 A-V and 159 A-B that he was familiar with that series of correspondence and that he participated in it. The correspondence was between Mr. Alexander and him. The original letter was from him to Mr. Alexander, being Resp. Ex. 159 A with an attachment, being 159 B and Mr. Alexander's reply was dated December 22, 1933 and is Resp. Ex. 158 A with attachments running to 158 V.

Q. Mr. Reiter, will you explain the circumstances which gave rise to this correspondence, please.

A. The Freight Rate Bureau of The Cement Institute at Chicago was re-issuing all freight rate books previously issued by that Bureau and intended to use additional
16862 headline points. My letter to Mr. Alexander as trustee of District No. 8 advising him of what headline points we proposed to use in certain books in or near that district, and asking his advice or suggestions as to any additional points required in his opinion or whether some points, headline points, we suggested should be eliminated. He evidently requested similar information from members of the Institute in his district and he replies giving me the consensus of members' opinions and also attaching their letters of reply to him.

Q. What suggested headline points were included in the list you sent to Mr. Alexander, what was the type, I mean?

A. Headline points which in my opinion coverel all shipping points from which any appreciable amount of cement was shipped into the States covered by the books listed.

Q. Do you know whether or not these suggestions were ever incorporated in the rate books?

A. The suggestions received for additions, from Mr. Alexander, were generally incorporated in the new rate book. Some were not.

Q. You say "some were not." Why were some of the points left out?

A. Our investigation, or my investigation in the Chicago office indicated that there were no freight rates from some of the headline points suggested, and further that from some of the other points no appreciable amount
16863 of cement moved into the States which were under discussion.

Q. But other than what you have specified, Mr.

Reiter, did you include the suggestions as made by the members, themselves?

A. Yes. Other than that we included all points suggested.

Q. Now, can you tell us if any point was not included how could the shipper get the rate information, Mr. Reiter?

A. A member of the industry could and often did write us for rates to destinations within a certain State from a particular shipping point which he owned, and when such a request was received we sent him a schedule of rates covering the request, and usually included those rates in the next issue of that particular freight rate book.

Q. Now, on direct examination you testified about the destinations contained in every freight rate book, at pages 4095 and 4096 of the record, and up to this time you have been talking about shipping points.

I am now directing your attention to destinations. Are they listed anywhere in this book, Mr. Reiter?

A. The destinations or station points, as they are known, are listed in these books in the lefthand column in all cases.

Q. Then within any given State what rail destinations do the books contain?

A. They contain all of the station points listed 16864 in the tariff, with minor exceptions.

Q. What exceptions do you have in mind?

A. A station point listed in the tariff which was a siding for a gravel plant or a coal mine and—or a passing track may not have been listed because no cement moved to such a destination.

Q. I think you have told us why the headline points were dropped in certain instances, did n't you?

A. Well, headline points were dropped because the mill was abandoned or because no appreciable amount of cement any longer moved to the State in question.

Q. There has been considerable testimony here as to certain corrections of these freight rate books. What is the source of the rates published in these various rate books?

A. The source of the rates were the official tariffs of the railroads on file with the Interstate Commerce Commission or the State regulatory bodies.

Q. Are railway tariffs changed from time to time?

A. Yes, Mr. Leisure, they are.

Q. How does the Institute rate book meet this situation?

A. Supplements to the various freight rate books are issued to advise the members of changes in the tariff rates.

16865 *Examination on Voir Dire.*

By Mr. Wooden:

Q. Referring to Respondents' Exhibit 158-T, for identification, how do you know that that is a correct copy of the Lone Star Company to Mr. Alexander ?

A. Well, as it stands here by itself, I do not know it except that it shows The Cement Institute's receipt stamp and was evidently received on December 23d. Now, if that follows closely the date of Mr. Alexander's letter I presume the inference would be that it was attached.

Q. Does the same thing apply to these other letters addressed to Mr. Alexander that are parts of this series of exhibits?

A. If they are copies and not originals.

Mr. Wooden: I assume that in offering these Mr. Leisure is vouching for the correctness of any copies that appear among them as distinguished from the originals?

By Mr. Leisure:

Q. Those copies, Mr. Reiter, were enclosed in the letter from you to Mr. Alexander, were they not?

A. Yes, sir; I received copies of letters.

Mr. Leisure: I have no doubt that they are correct copies, Mr. Wooden.

16866 The Witness: —with his letter to me, I think his letter states there that copies were attached.

(RESP. EX. 158-A to 158-V, also 159-A & B, both inclusive, were offered and received in evidence.)

16868 The witness identified Resp. Ex. 160A-3K as correction sheets and supplements to Indiana rate book No. 1, (Resp. Ex. 156) or Indiana rate book No. 1-A (Resp. Ex. 157).

16869 (RESP. EX. 160-A to 160-KKK, both inclusive, was offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Reiter, what was the purpose of the correction sheets; what purpose did they serve?

A. They served to notify holders of the books of changes in rates that occur in the railroad tariffs; the abandonment of stations or the addition of new stations.

Q. And noting tariff changes, did you say—have you said that?

16870 A. Yes, sir; I did say that.

Q. In other words, it kept the books up to date; is that what you say?

A. That is correct.

Q. You have described, then, a correction sheet as a supplement. Were they always used only to correct errors?

A. No, indeed, that was minor use for them. If, however, there were any errors in the rate books which were discovered or called to the attention of The Cement Institute, they were corrected promptly by one of these supplements.

Q. Why was it necessary, Mr. Reiter, to give prompt information concerning new stations or dropping of old ones, as you have described?

A. Well, in the absence of information on dropping existing stations or adding new stations it is conceivable to me that a shipper might attempt to ship to a station where freight was no longer received or would have no knowledge of a new station through which he could serve his customers.

Q. Now, in all of your experience, Mr. Reiter, can you tell us of any instance where an incorrect rate was knowingly used by any cement company?

A. I know of no such instance where an incorrect rate was used knowingly.

Q. Did the Institute receive any notice from members concerning errors in the books?

16871 A. Yes, sir.

Mr. Leisure: I ask to have marked for identification correspondence starting with the date of February 4, 1936.

(The documents referred to were marked for identification as Respondents' Exhibits 161-A, 161-B, 162-A, 162-B, 163-A, 163-B, 164-A, and 164-B.)

By Mr. Leisure:

Q. Will you just look at those Respondents' exhibits, Mr. Reiter, and explain for the record what they are?

A. In all cases these exhibits are letters from members of the Institute to the Chicago office indicating that in the belief of the members writing the letters—

Trial Examiner Norwood: I would not say what they indicate.

By Mr. Leisure:

Q. Don't tell us anything about the—

Trial Examiner Norwood: Letters regarding the rates?

The Witness: These are letters to the Chicago
16872 office of The Cement Institute concerning rates.

By Mr. Leisure:

Q. Are they representative of advices from members of the Institute with reference to the rates published in the rate book?

A. Yes, sir.

Mr. Leisure: I offer them in evidence.

Mr. Wooden: May I ask a question, Your Honor, on the voir dire?

Trial Examiner Norwood: Go ahead.

*Examination on Voir Dire by Mr. Wooden.*

Q. Referring to Respondents' Exhibits 161-A and B, 162-A, and B, 163-A and B, and 164-A and B, from what files were those papers produced, Mr. Reiter?

A. I cannot say, Mr. Wooden. Respondents' Exhibit 161-B—well, in respect to all of these exhibits they at one time have been in the files of The Cement Institute. I do not know where they were produced from at this time.

Q. Do you know whether they were in the files of The Cement Institute in January, 1938?

A. No, sir; I do not.

Mr. Wooden: There is no objection to the exhibits as such, Your Honor. They are similar in character to some that were produced and put into evidence on direct
16873 examination.

I am somewhat interested in knowing why they weren't produced in response to the subpoena duces tecum in January, 1938.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 161-A, 161-B, 162-A, 162-B, 163-A, 163-B, 164-A, and 164-B, were received in evidence.)

By Mr. Leisure:

Q. Mr. Reiter, were The Cement Institute's freight rate books furnished to all members of the Institute?

A. All members who requested them or who were known to ship into the territory covered by the books.

Mr. Paulson: Now, which one? He did not answer the question.

A. (Continuing.) That was true as to all—

Mr. Paulson: I don't think that is an answer to the question. The answer is in the alternative there.

Trial Examiner Norwood: Read the question and answer.

(Question and answer read.)

Trial Examiner Norwood: I think that answers it. Objection overruled.

By Mr. Leisure:

16874 Q. Was any special charge made for this service, Mr. Reiter?

A. The money to cover the expenses of the freight rate books were collected as a part of the special dues of The Cement Institute.

Q. How long has it been a practice for the Institute to issue freight rate books?

A. From early in 1930 down to the present time.

Q. Were freight rate books furnished to non-members?

A. Sometimes.

Q. To what extent, in your experience, Mr. Reiter, have you ever received any notices or criticisms to the effect that the Institute's freight rate books were inaccurate?

A. I have received, of course, letters from members of the industry calling attention to specific inaccuracies in the book, such as the exhibits which we have just seen, but—

Q. My question was how often or to what extent?

A. They were infrequently called to my attention.

Q. And since you have been with the Universal Company, do you know whether or not the Universal finds these rate books to be accurate or inaccurate?

A. We believe in the Universal Company that they are the most accurate freight rate books which have been available to us through our own preparation or from any other source.

Q. On the direct examination you were asked by Mr.

Wooden whether there was any organization of
16875 Lehigh Valley mills to handle freight rates, to which you answered "No.".

Mr. Leisure: That is page 4074 of the record, Mr. Wooden.

By Mr. Leisure:

Q. Do you know of the Nazareth Traffic Bureau, Mr. Reiter?

A. Yes, I have heard of it.

Q. When did this bureau operate, if you know?

A. I don't know the date, but it was prior to the formation of The Cement Institute.

Q. Do you know what companies had the service of this bureau?

A. The smaller companies or the single-plant companies in the Lehigh Valley.

Q. The Iola Bureau has been mentioned. Do you know whether or not the Iola or the Nazareth Traffic Bureaus had any connection with the Institute at any time?

A. Neither one of them had any connection with The Cement Institute.

Q. There has been a discussion in the case at different times with respect to the conversion tables attached to these freight rate books. Do you know when the conversion tables were first included in the Institute freight rate books, Mr. Reiter?

A. They were included in the first rate books issued by The Cement Institute; namely, the rate book No. 1 series.

16876 Q. What were the circumstances which led up to the inclusion of a conversion table?

A. Well, the railroad tariffs are almost always expressed in rates of cents per hundred pounds, and it was, of course, necessary to convert this rate in cents per hundredweight to cents per barrel, and the conversion table was for the purpose of doing that.

Q. Mr. Reiter, were you in charge of the Chicago office when the first books were issued?

A. I was, Mr. Leisure.

16877 Q. Mr. Reiter, were the freight rate books issued first in the Chicago Division and then later in the Eastern Division?

A. They were issued almost simultaneously and they

were called freight rate books No. 1 in both cases
16878 because the freight rate books for different states were issued in different offices.

Q. You and I have been discussing since the lunch period, almost continuously, freight rate books No. 1, and those we have been discussing and which have been offered in evidence here, and the correction sheets thereof all have to do with the Chicago Division; isn't that so?

A. Yes, sir; and were prepared under my direct charge.

Q. And you, when you were testifying, were testifying about these books and these correction sheets, were you not?

A. That is right.

16880 Q. Mr. Reiter, you testified when we started discussing this subject of freight rate books, I believe, that the method of compilation was to take all available books which were then privately issued and use them in the compilation of your new books, together with the freight rate tariffs; is that correct?

A. That is correct.

Q. Did any of those have any conversion tables?

A. I believe that all of them had conversion tables.

Q. As I understand you, as to your first conversion tables, you copied those from previous—at least as to form—from previous publications.

A. As to form. I do not know whether it exactly followed any other conversion table appearing in their own freight rate books, or not.

Q. How are these freight rates expressed in the
16881 official tariffs, Mr. Reiter?

A. Almost entirely in cents per hundredweight.

Q. And how are the freight rates expressed in the Institute freight rate book?

A. In cents per hundredweight.

Q. I think we have this, but to be sure the record is clear on it: What is the weight of a barrel of cement packed in sacks?

A. 380 pounds.

Trial Examiner Norwood: Doesn't that vary?

The Witness: Not if it is packed in sacks; that is the official weight.

Mr. Wooden: What kind of sacks?

The Witness: Either kind; paper or cloth.

By Mr. Leisure:

Q. Will you tell us, Mr. Reiter, the manner in which the freight rates being in cents per hundred pounds are changed into cents per barrel?

A. The rate in cents per hundred pounds is multiplied by 3.8.

Q. Now, is the conversion table to which you have referred carried as a schedule in the front of the freight rates?

A. Well, it is carried in the front of the original rate books.

Q. Will you explain to the Examiner for what
16882 purpose it is carried there, please?

A. It is carried for ready reference in converting cents per hundredweight to cents per barrel.

Q. Will you just explain so the record is entirely clear as to what a conversion table is?

A. In one column is shown the rate in cents per hundredweight and in the other column is shown the rate in cents per barrel opposite the corresponding rate in cents per hundredweight.

Q. During the period while you were connected with the Institute, to what extent did the freight rate books carry conversion tables, Mr. Reiter?

A. The freight rate books issued by the Bethlehem Rate Bureau continued to carry conversion tables during the entire time that I was connected with The Cement Institute but during part of that time I dropped the conversion tables from the books issued by the Chicago Freight Rate Bureau.

Q. Now, suppose we take up a new subject. Suppose we take up the activities of the Institute with respect to tax. Did the Institute have a tax committee?

A. Yes, Mr. Leisure.

16883 Q. How was it appointed?

16884 A. By the chairman of the board of trustees of The Cement Institute.

Q. And do you know when?

A. I believe it was appointed during the year 1935, or the previous year.

Q. 1934?

A. 1934.

Q. Now, just briefly, Mr. Reiter, in a general way, what type of work did it perform or undertake?

A. This committee concerned itself with taxes, processing and compensating taxes on cloth and paper bags, including floor stock taxes, and it secured a ruling by the Department of Agriculture rescinding this tax which had previously been put on floor stocks and processing of cloth bags.

Q. And after this ruling do you have in mind any other activity you can discuss briefly?

A. After this ruling was secured, with the cooperation of Counsel, it advised members what steps to take to secure the refunds of such taxes incorrectly collected.

16885 Q. Was this committee continued in office, Mr. Reiter?

A. No, it was not continued in office.

16887 Q. Was there ever any committee of the Institute known as the Local Materials Committee?

A. Yes, Mr. Leisure.

Q. What were the circumstances surrounding the appointment of that committee, if you know?

A. The P.W.A., as well as many state regulations, provided a preference for cement manufactured within the state for use on projects within that state and the Local Materials Committee was appointed to deal with that situation.

Q. How did these regulations affect the producers of cement?

A. Well, it worked a hardship on a number of producers, particularly those who were located near the

16888 state line, but outside of the state where the project was to be constructed, and who could, in many cases, serve the project with less haul or more satisfactory delivery than plants located within the state.

Q. Were any of its efforts in connection with P.W.A.? Mr. Reiter?

A. The Local Materials Committee did make efforts to have the rule of the P.W.A. rescinded and those efforts were successful so that local cement was not any longer preferred for non-Federal projects within the state.

Q. Can you tell us whether the individual states had restrictions comparable to P.W.A.?

A. Some 30 states had such restrictions.

Q. And did this committee of the Institute deal with these individual state restrictions?

A. Shortly after its formation the local materials com-

mittee recommended that its efforts be confined to Federal projects and Federal regulations of this kind and that the local efforts should be put in the hands of local committees, and local committees were appointed for that purpose.

Q. When you say they were appointed, were they recognized in any way by the officials?

A. They were recognized by the officials in many states and in some cases were successful in having these
16889 local preferences or local requirements removed.

Q. Mr. Reiter, what happened with respect to this local materials committee? Is it still in effect?

A. No, it is not now in existence, and it completed its work in 1935.

Q. Now on direct examination you were questioned about the position taken by this committee that a state could buy as advantageously from mills outside of the state as it could from mills within the state.

Mr. Leisure: Pages 4520 and thereafter, Mr. Wooden.

Q. What was the position of the Local Materials Committee on that subject?

A. Well, the Local Materials Committee expressed themselves as believing that in many cases the mills lo-
16890 cated outside of the state could serve a project as well as or better than the mills within the state.

Q. Are cement mills distributed more or less evenly among the 48 states, Mr. Reiter?

A. By no means.

Q. Are there states with productive capacity that exceeds the consumption of the state?

A. Yes, Mr. Leisure.

Q. Now take up another subject, the question of marketing research. Did the Institute have any committee on that subject?

16891 A. Yes, the Institute had a marketing research committee.

Q. And when was it appointed, if you know?

A. My recollection is that that committee also was appointed in 1934.

Q. Do you know what led up to the appointment of this committee or the circumstances surrounding that situation?

A. Certain members of the industry had conferences and discussions with members of the Federal Trade Com-

mission and reported back to The Cement Institute, or its board of trustees, the substance of these discussions.

Mr. MacIntyre: Now, if Your Honor please, again we ask that in making answers such as is being made here, that the names of the parties be given that made these reports and held the discussions; otherwise we don't know which discussions are being talked about or what parties are being talked about.

Trial Examiner Norwood: I think so. I think the point is well taken.

You should lay the grounds for that.

By Mr. Leisure:

Q. Will you keep that in mind and give us dates and names, Mr. Reiter?

Was there a committee on the Heard Act also?

A. Yes, sir.

Q. What was the purpose of organizing that com-
16892 mittee, if you know?

A. The committee on the Heard Act was appointed to assist the National Association of Credit Men and others, in favoring a bill to more fully protect the suppliers of materials to Government contractors.

Mr. Wooden: Your Honor—

Q. You mean under the Public Works policy, Mr. Reiter? Is that what you have reference to?

A. Yes, I do.

16897 Q. Mr. Reifer, did the Institute ever concern itself with labor problems?

A. Yes, there was a labor committee of the Cement Institute.

Q. And was this a permanent or temporary committee?

A. It was appointed as a temporary committee in 1933 to advise and consult on the wages and hour provisions of the proposed code for the Cement industry.

16898 Q. With what, if anything, did this committee deal after the Code had been approved, Mr. Reiter?

A. The Code Authority referred to this committee labor problems which arose from time to time seeking the advice of this committee before action was taken by the Code Authority.

Q. Did this committee have anything to do with labor statistics in any way?

A. They aided the Bureau of Labor Statistics in perfecting a form for soliciting information on wages, hours, and earnings of labor such solicitation of information going to members of the cement industry. After aiding the Bureau of Labor Statistics in perfecting this form, so that the information could be readily given by members of the cement industry, they urged members to comply with the request for the information by the Bureau of Labor Statistics.

16899 Q. Was that in connection with, or did it have any connection with the Labor Department?

A. The Bureau of Labor Statistics is a division or Bureau of the U. S. Department of Labor.

Q. Did it undertake any other work along that line, if you recall, at the moment?

A. It did at one time send a questionnaire to the industry for certain information on wages and hours, particularly to see whether or not the provisions of the Code were being complied with by the industry.

Q. Mr. Reiter, I show you Respondents' Exhibits 165, 166 and 167 and ask you to explain briefly what they are.

A. Respondents' Exhibits 166 and 167 are a report on labor relations issued by the Committee on Labor in conjunction with the Cement Information Bureau, both

16900 of the Cement Institute, and Respondents' Exhibit 165 is the letter of transmittal by which copies of its reports on labor relations were sent to the members of the Cement Institute.

16901 Q. Did the Institute have a tariff committee, Mr. Reiter?

A. Yes, sir.

Q. When was this committee appointed?

A. The committee was appointed early in 1934, I believe in April of that year.

Q. Did this committee function during 1936?

16902 A. No, sir; it didn't.

Q. What, if anything, did it do after that time, after 1936?

A. It made a study of imports of foreign cement into the United States and disseminated such information to the industry showing imports for the year 1936 as against imports for 1934, being the last year prior to the effective time of the reciprocal trade treaties and showing that im-

ports in 1936 were approximately six times those in 1934. It also—

Q. Go ahead.

A. It also, together with counsel, prepared the protest for any further reduction in the tariff. In fact, protesting against the reduction in the tariff which had already occurred, and this protest was filed with the reciprocal tariff committee and signed by members of the industry along the Atlantic and Gulf Seaboards, particularly affected by imports of foreign cement.

16903 Q. Mr. Reiter, let me direct your attention to this exhibit, since the matter has been raised, Exhibit 886-S and T; do you recall that letter, Mr. Reiter?

A. Yes, I do.

Q. Will you explain to the Examiner in connection with that exhibit why that material was being sent to you?

A. This material was sent by a member of the tariff committee in connection with the study of the import situation which I have previously described and which was made in the early part of 1937.

Q. And I believe you have already told us, Mr. Reiter, that a protest was prepared?

A. Yes, sir.

Q. I want to direct your attention also, Mr. Reiter, to Commission's Exhibit 885-AA, which starts as follows:

"Gentlemen: Enclosed herewith is a 19-page draft of the protest on cement imports to be submitted to the committee for reciprocal information."

Trial Examiner Norwood: Is that a Commission's exhibit?

Mr. Leisure: Yes, sir.

By Mr. Leisure:

16904 Q. Do you know the date of that protest that you have just been describing, Mr. Reiter?

A. I don't know the date of the protest but a draft was sent to the member of the committee on April 6, 1937.

Q. Let me show you Respondents' Exhibit 168-A to 168-J, inclusive, for identification, and ask you to refresh your recollection from that. Tell us whether you can now say the date that the protest was made (handing document to the witness).

A. I see no date on this statement and my recollection is that it was prepared and submitted to the com-

mittee for reciprocity information early in the spring of 1937 and I do not recollect the date any more accurately than that.

Q. Very good.

What is meant by the words "Control Committee," Mr. Reiter?

A. There was a Control Committee of The Cement Institute who had charge of preparing a code for the cement industry to be submitted to N.I.R.A. for approval.

16905 Q. How long did it continue to operate?

A. It was formed in either June or July, 1933, and was automatically discharged with the approval of the cement code.

Q. Is that what is meant by the use of the words "Control Committee" in Commission's Exhibit 616-A on page B (handing document to witness)?

A. That is correct.

Mr. Paulson: I wonder if we could have an understanding of the use of the term "Institute" when the witness answers "It was provided for by the Institute"? Was it provided for in the articles of the Institute?

Mr. Zimmerman: What?

Mr. Paulson: This Control Committee provided for by the articles of association of the Institute, or was it just a—

Mr. Leisure: Mr. Paulson has a question he would like to ask. You don't mind answering it, do you, Mr. Reiter?

The Witness: Not at all.

Mr. Leisure: Will you answer that for him?

The Witness: It was a committee appointed like other committees, appointed by the president of The Cement Institute and approved by the board of trustees.

By Mr. Leisure:

Q. Mr. Reiter, on direct examination you were
16906 asked certain questions with reference to certain expenses of The Cement Institute. One of them, I recall, was with reference to the anti basing-point bill.

Mr. Leisure: Page 3310 of the record, Mr. Wooden.

By Mr. Leisure:

Q. In your answer you gave some expenses. Can you tell us now whether you covered all of the expenses incurred?

A. My recollection is that I left out two items which occasioned the major expense at that time, one being the purchase of a copy of the original transcript and the second being the reproduction of that transcript for distribution to members.

Q. And was there any other expenses that you left out that you now recall?

A. The only other expenses connected with the anti-basing-point appearances were occasioned by myself, and consisted of my own traveling expenses and expenses for telephoning and telegraphing to witnesses from the industry requested by the Committee.

Q. And what did that amount to, if you know; the expenditure of The Cement Institute?

A. The total amount was approximately $3,500.

Q. And how much time did you spend on that matter in Washington?

A. Oh, several weeks; four or five weeks.

Q. That was just as to yourself, personally?

16907 A. That is right.

Q. Will you explain any further activity that you had concerning whether or not you had any cooperation with Counsel for the Committee?

A. Well, at the request of the counsel for the Wheeler Committee—

Q. Senate Interstate Commerce Committee?

A. That is correct.

(Continuing) —I did communicate with members of the industry who he desired to appear as witnesses before the Committee, and assisted him in arranging for appearances and canceling appearances of a certain date and postponing them to other dates, and so forth.

Q. Did the witnesses appear voluntarily of their own initiative?

A. Well, they appeared upon invitation but the counsel for that Committee upon inquiry told me that if they didn't appear voluntarily he would issue subpoenas for them.

16908 Washington, D. C.,
March 2, 1939.

16913 GEORGE H. REITER thereupon resumed the stand and testified further as follows:

*Cross-Examination (Continued) by Mr. Leisure.*

Q. Mr. Reiter, yesterday we were discussing the freight rate books and your participation in their preparation.

I would like to ask you this morning what, if any, consideration you gave when you were preparing those books, as to whether or not a mill was or was not a so-called basing point?

A. We gave no consideration to that whatever, Mr. Leisure.

Q. You have testified that a code of ethics was prepared at the commencement of The Cement Institute. As an employee of The Cement Institute did you have any duties to perform in connection with it, Mr. Reiter?

A. I did not.

Q. I note that the Commissioner's Exhibit 136, in that there is a reference made to a proposed plan for reporting violations of the code of ethics.

Was the code of ethics ever policed or violations
16914 reported to the Chicago Division while you were manager of that division?

A. No, it was not policed nor were violations reported while I was with the Chicago Division.

16915 Q. Mr. Reiter, during the period you were in office as manager of the Chicago Division, did there ever come to your attention, and, if so, where, when, and under what circumstances were there any violations of the code reported to you?

16916 A. No reports of violations were made to me, nor none came to my attention.

By Mr. Leisure:

Q. Were there any activities of any kind, Mr. Reiter, while you were acting in this capacity, directed toward calling to the attention of the code authorities—I

16917 mean to interest the committee, anything that would tend to penalize in any way violators of the code of ethics.

Trial Examiner Norwood: I will overrule the objection, and I will ask the question:

Were there any enforcement activities conducted by you, or the Chicago office?

16918 The Witness: There were none.

By Mr. Leisure:

Q. And were there such at any time, conducted through the Institute, to your knowledge?

A. Not to my knowledge, Mr. Leisure.

Q. Now, on your direct examination, you were asked questions as to whether or not the provisions concerning diversions reflected the industry custom of selling at destination prices: That appears in—that was at the time you were being examined with respect to Article X in the N.R.A. code, Commission's Exhibit 557.

Mr. Reiter, when a member filed a price of $2 per barrel for a particular destination, did you consider it a violation of the code if the purchaser of the cement could have had the cement delivered to another destination which

16919 had a higher price?

A. Yes, it was a violation of the code, Mr. Leisure.

Q. Could you tell us what was the purpose, if you know, of this provision?

A. The purpose of the section of the N.R.A. code prohibiting diversions was inserted in order to make the open price plan effective.

Q. Did the Code Authority dictate or attempt to dictate in any way what prices should be filed with the Code Authority?

16921 A. The Code Authority neither dictated nor attempted to dictate what prices were to be filed, their only concern being that such prices as were filed were definite as to terms and conditions.

Trial Examiner Norwood: Well, was not the requirement that each member of the industry should file the price after he bid it?

The Witness: No. The requirement of the code was that he should file the price before it was used, unless he was meeting a price filed by a competitor.

Trial Examiner Norwood: And if he failed to do that he violated the code, did he not?

The Witness: That is right, Your Honor.

Mr. Wooden: Five days is provided in the code.

By Mr. Leisure:

Q. But as I understand your testimony, Mr. Reiter, the answers previously given still stand as to whether or not what prices were to be used were suggested in any way by the code authority?

16922 A. That answer that I made should stand, in my opinion.

16927 Q. Mr. Reiter, I show you Exhibit 630-A, being a Commission's Exhibit, and ask you to explain the circumstances surrounding that exhibit at the time it was written.

A. With reference to this opinion of the Code Authority or interpretation of the code by the Code Authority, a contractor had a construction job at or near Alton, Illinois, and evidently a price was filed f.o.b. Alton, Illinois, only which applied to that location, and the contractor was asking the cement companies to sell him, or certain cement companies to sell him f.o.b. mill and the substance of this interpretation to me is that the Code Authority's opinion was that it would be a violation of the code to sell the contractor f.o.b. his barges at mill unless such price was filed with the Code Authority.

Q. Now you have already told us, Mr. Reiter, that there was a code of ethics for the Cement Institute during the time you were manager of the Chicago Division. Was this code of ethics still in effect at the time you returned to your position with the Cement Institute in 1933?

16928 A. No, it was not.

16929 Q. Mr. Reiter, was the code of ethics ever cancelled in any way?

A. Yes, it was.

Q. When?

A. In June, 1933 by action of the Board of Trustees.

Q. All right. I think you have already told us, Mr. Reiter, that the Institute compiled and distributed land grant information during 1936?

A. That is right.

Q. In connection with the land grant rate service rendered by the Cement Institute, just what did it do? Will you explain that to the Examiner?

16930 A. It received filings of land grant rates from its members and disseminated such information so received to the members.

Q. Mr. Reiter, I want to direct your attention to Commission's Exhibit 841-J and particularly to the first paragraph, first three lines, which says:

"There is no official publication of all current applicable land grant rates. For the convenience of members the Cement Institute compiles information from many sources concerning land grant rates to aid the cement companies in giving the U. S. Government the full benefit thereof."

In sending this information on land grant rates did the companies always indicate the source of their information?

A. Yes, they did, Mr. Leisure.

Q. And what were those sources?

A. Well, the sources were three: First, Government quotations of land grant rates; second, land grant rates furnished to cement companies by railroads, and, third, computation of land grant rates by a company's traffic manager.

Q. What was the practice, Mr. Reiter; was it customary or not customary for member companies sending in such information to include in their computation destination costs to the United States Government?

16931 A. It was not the custom to include a computation of Government destination costs.

Q. When you say it was not the custom you mean it was not done?

A. It was not done, in a few cases.

Q. Were there any cases where a company sent land grant data to the Institute and also included information about Government destination costs?

A. As I say, there were a few cases of that kind.

Q. Now, when the Institute sent out this land grant information, did it include this information about destination costs which you say did come in, in a few cases?

A. No, it did not.

Q. What did it include?

A. It only sent out the information on land grant rates which were supplied by that member.

Q. Did it indicate the source?

A. And it indicated the source, as stated, by the member filing the land grant rates.

Trial Examiner Norwood: Well, the prices filed were the destination cost prices, were they not?

The Witness: Well, Mr. Leisure is asking me about land grant rates and these are not prices filed; they are merely freight rates of land grants available to the Government.

16932 By Mr. Leisure:

Q. Were there any prices filed during that year, Mr. Reiter?

A. Price filings entirely ceased in December of 1935.

Mr. Leisure: I would like to have marked for identification a document dated January 28, 1937.

(The document referred to was marked Respondents' Exhibit 169, for identification.)

By Mr. Leisure:

Q. Is that your signature, Mr. Reiter?

A. Yes.

Mr. Leisure: If Your Honor pleases, this document purports to show the date that the Cement Institute discontinued distribution of information on land grant rates.

I therefore offer it in evidence (handing document to Mr. MacIntyre).

(RESP. EX. 169 was offered and received in evidence.)

16933 Q. Mr. Reiter, will you explain what the purpose of this service was, land grant rates?

A. It was for the purpose of furnishing to the members the most complete and accurate information of land grant rates that were available, inasmuch as there were no official publications of land grant rates which were available to members of the industry.

Q. Now, I understood you to say that it was done during the year—this service was rendered during the year 1936?

A. That is right, Mr. Leisure.

Q. Was it done during the entire year?

A. It started for a short time in December, 1935, and concluded about the middle of January, 1937, or extended over for a few days in January of that year.

Q. Now, Mr. Wooden asked you certain questions on your direct examination having to do with the Institute and its contact with dealers and the relationship between dealers and dealer organizations, and individual cement manufacturers.

I would like to direct your attention to Commission's

Exhibit 202, where a dealer asked the Institute to aid him because the cement company sold to a dealer outside the area surrounding that dealer's place of business.

I direct your attention particularly to Commission's Exhibits 202-BB and 202-CC (handing documents to the witness).

What was the usual policy of the Institute on
16934 receipt of such requests, Mr. Reiter?

A. The usual policy was to tell the person requesting the action by The Cement Institute that it was not within the province of The Cement Institute to handle such a matter.

Q. And what is Commission's Exhibit 202-BB?

Trial Examiner Norwood: That was the policy at what time?

The Witness: At all times, Your Honor.

Trial Examiner Norwood: That was after the code?

The Witness: Before, during, and after the code, that was the policy of The Cement Institute.

Trial Examiner Norwood: What time do these exhibits deal with?

The Witness: It is an exchange of telegrams dated May 1, 1936.

And answering your question, Mr. Leisure, Commission's Exhibit 202-BB is Cement Institute's reply to a dealer stating the Institute had nothing to do with the sales policy of a member company.

16935 Q. Mr. Reiter, you testified concerning the Lehigh differential policy which was used before the N.R.A.; was there any uniform action among the producers on this policy after it appeared?

A. Far from it, Mr. Leisure.

Q. When, if ever, to your knowledge, was this
16936 abandoned by the Lehigh Company,—was there—

A. Well, it was abandoned by the Lehigh Company, but I don't remember when.

Q. To your knowledge, Mr. Reiter, did producers ever set differentials; I mean, of course, dealer differentials?

A. Cement companies at one time had a price to consumers and allowed a dealer differential, or a dealer discount, but that was some time ago and was not in effect at the time that The Cement Institute was started in 1930.

Q. Was this policy of the Code Authority during the Code period?

A. I don't understand your question, Mr. Leisure.

(Question read by the Reporter.)

Q. I am referring back to my previous questions, Mr. Reiter; did the Code Authority set any dealer differential?

A. No, sir.

Q. You have been shown on direct Commission's Exhibit 1019-C. If you will recall, this was an interpretation by the Code Authority of Article XI, section 2, where it provides—a part of it provides—it is made in December 22, 1933—and part of it provides: "However, any manufacturer may for any reason decline to sell them at all, but where a manufacturer has declined to quote or sell a buyer direct he cannot evade this provision by selling the same buyer through a building material dealer, since no
16937 manufacturer can protect such dealer with specific sales orders or contracts covering such sales."

During the period of the Code, did the Code Authority ever attempt to set or fix dealer differentials (handing paper to witness)?

A. No, they did not.

Q. Will you explain for the record what the term "dealer differential" means?

A. The dealer differential is the difference between what the dealer receives for cement which he sells and the price which he pays for that material.

Q. Did The Cement Institute or the cement Code Authority, to your knowledge, have anything to do with suggesting that there should be a model mark-up in the dealer code, or how much it should be?

A. We had nothing to do with that whatever, either in The Cement Institute or the Code Authority.

Q. We have had some testimony at different places on the record as to the different locations of The Cement Institute offices. The record shows that it moved from Chicago to New York, and then on page 3142 of the record it shows that the offices were moved from Chicago to Washington.

Will you tell us, please, where the general offices of The Cement Institute were moved when they left Chicago?

A. They were moved from Chicago to Washington.

16938 Q. When was that, Mr. Reiter?

A. That was in 1936, and in November of that year I believe—no—that is, correct; it was late in 1936.

Q. You have already said they moved from New York to Chicago?

A. Yes, sir; they were moved—

Q. In 1935, I think you said?

A. That is correct.

Q. Then, I believe the record shows that they moved back—and you correct me if this is wrong—they moved back to Chicago from Washington?

A. That is right.

Q. I would like to direct your attention, Mr. Reiter, to Commission's Exhibits 602 and 595-A (showing papers to witness).

Would you explain your purpose in writing that letter there, Mr. Reiter? I am referring to Commission's Exhibit 602 (indicating).

A. Well, this was just a matter of control, which I thought it was proper for me to exercise as general manager in having on file in the general office the minutes of all meetings of The Cement Institute held in offices, as well as the minutes of all general meetings of The Cement Institute.

Q. Now, Mr. Wooden directed your attention to Commission's Exhibit 274-A to E, and your reply to that 16939 exhibit dated September 14, 1935. In your reply you refer to a meeting of the industry on September 26, 1935.

Will you tell us now whether you recall whether or not this was a meeting of The Cement Institute, or some other group in the industry? I show you Commission's Exhibit 274-A (handing document to the witness)?

A. Yes, that was a meeting of The Cement Institute to which I referred.

Q. I would also like to direct your attention to Commission's Exhibit 599 (handing document to the witness), and I direct your attention to the second page of that exhibit.

Was that the minutes of the meeting of The Cement Institute on September 26, 1935—

A. Yes.

Q. —to which you have referred?

A. Yes, it is.

Q. Well, I notice the letter states: "This office will not issue notices for this meeting."

Will you explain that for the record, please?

A. Well, under this date of September 26—or Septem-

ber 14, 1935—the office of the Secretary, and the general office, was at New York City, and therefore notices of that meeting would come from his office.

Q. And where were you writing from, Mr. Reiter? Could you—

A. I was writing from Chicago.

16940 Q. Can you describe what kind of a meeting was held?

Mr. MacIntyre: If your Honor please, again we would like to know whether or not he is speaking from his own knowledge or whether he is reading from some part of the minutes of a meeting?

Mr. Leisure: I think I can clear that up.

By Mr. Leisure:

Q. Suppose you tell us what was discussed there, if you know, Mr. Reiter?

A. It was a meeting of the entire membership of The Cement Institute, and it was to discuss a report to the membership, action of the Board taken at a previous meeting, considering the Schechter decision and the status of the Code Authority being canceled, and the N.R.A. code being ineffective.

Q. What was decided, if anything, with respect to continuing the N.R.A. code?

A. The decision was made, a trade practice committee having already been appointed at a previous meeting, to continue, so far as they legally could, to adminster the provisions of the code on a voluntary basis if the membership cared to avail themselves of their service.

Q. Now, on page 3307, on direct, in connection with the Pacific Coast Cement Institute, you referred to certain Cement Institute correspondence as being confidential in nature.

Will you explain what correspondence you had

16941 reference to?

A. Well, I referred to correspondence between the officers and trustees of The Cement Institute which were not generally distributed to all members.

Q. Now, in Mr. Cree's testimony, reference was made to letters written by The Cement Institute. I would like to ask you, did The Cement Institute ever send or receive from the members or the trustees any unsigned letters which were to be destroyed by the persons receiving them?

A. No, they never received such letters.
Q. Or wrote them?
A. Or wrote them.
Q. Or sent them?
A. Or sent them.
Q. Mr. Reiter, you were asked questions on direct about the connection between the Institute and the Code Authority, and I think you have already testified that they were set up as two separate organizations. Did the Code Authority have meetings separate from the Institute meetings?
A. Yes, Mr. Leisure.
Q. And were the members of the Code Authority members of the board of trustees?
16942 A. Some were but most were not.
Q. Now, in your dealings under the N.R.A., did the N.R.A. deal with the Code Authority and the Institute as one body or did it deal with them as separate organizations?
A. The N.R.A. dealt with them as separate organizations. Most of the N.R.A. dealings, however, were with the Code Authority.
Mr. Leisure: I ask to have marked for identification a two-page document dated May 29, 1934.
(The two-page document was thereupon marked for identification as Respondents' Exhibits 170-A and 170-B.)
(The first page, Exhibit 170-A, contained mimeographed material on both sides of the page.)
Q. Mr. Reiter, I show you Respondents' Exhibit, for identification, 170-A and 170-B, and ask you if you recognize it (handing document to the witness)?
A. Yes, Mr. Leisure, I do recognize this as a copy of an official release of the National Recovery Administration, distributed by The Cement Institute office at New York to members of the industry.
16944 Q. Mr. Reiter, I show you Respondents' Exhibits 171-A to E, for identification, and ask you to explain what it is, if you know (handing documents to the witness.)
A. This is a general letter by the Chairman of
16945 the Code Authority dated June 29, 1934, transmitting to members of the industry excerpts from the N.R.A. reply to the second report of the Darrow Review Board.
Q. The excerpts which you just mentioned, Mr. Reiter, do those refer to the Cement Code?

A. Yes, sir.

16950 Q. Mr. Reiter, on direct examination there was referred to Respondents' Exhibits 126-A to D, and it has been testified to here that there was a separation—the Chicago Division and Code Authority. What have you to say to the set up of the expense accounts? Did the Code Authority have its own expense accounts, or were they carried together?

A. The expense of the Code Authority and of the Chicago Division of The Cement Institute was kept entirely separate.

Q. Were there any Code Authority dues to cover its expenses?

A. Yes, sir; the Code Authority dues assessed against all members of the Institute were set aside and separate funds for Code Authority purposes.

Q. Were there separate dues covering the activities of The Cement Institute?

A. Yes, sir; entirely separate from Code Authority dues.

Q. Were Code Authority dues collected from non-members of the Institute, Mr. Reiter?

A. Yes, Mr. Leisure, they were.

Q. Now, we have already made reference to the State plant in South Dakota. What was the situation as to its dues? Did it pay dues to the Code Authority?

A. It did.

Q. At the time of the Schechter decision which
16951 has also been mentioned here, was there any surplus Code Authority funds on hand at that time?

A. Yes.

Q. What disposition was made of these, Mr. Reiter?

A. All members of the industry were credited with their pro rata share of this surplus and were either sent a check covering their share of this surplus or their account with The Cement Institute was credited with their share, as they preferred.

The witness identified Resp. Exs. 172 A-B and 173 A-B as letters from the secretary of the Cement Institute to all members concerning the refund of the surplus on hand
16952 to the credit of the Code Authority at the time it was discontinued. They relate to the disposition of the Code Authority funds.

Trial Examiner Norwood: How did the Institute happen to wind up the Code Authority?

The Witness: The—as a service to the Code Authority, The Cement Institute went through the mechanical work of collecting dues from the industry, using the same facilities which they had for collecting Cement Institute dues, and they made no charge to the Code Authority for that service.

*Examination on Voir Dire.*

16955 By Mr. MacIntyre:

Q. Mr. Reiter, this facsimile signature at the bottom of Respondents' Exhibit, for identification, 172, whose is that?

A. That is the signature of H. C. Lundborg.

Q. Who is he?

A. He was secretary of The Cement Institute at that time.

Q. During what period?

A. He was secretary from—he was either officially secretary, or acted as secretary from February, 1931, until December, 1935.

Q. Is he still secretary of The Cement Institute?

16957 Q. As to the lower lefthand corner of Respondents' Exhibit, for identification, 172-A, Mr. Reiter, can you tell us whose initials they are?

A. Well, the first, of course, are the initials of the dictater, Mr. Lundborg.

Q. What can you say as to the other?

A. And the other initials are unfamiliar to me, but I am familiar with the style of initialing, and it is undoubtedly the initials of the stenographer to whom he dictated this letter.

Q. You would accept it as such, would you not?

A. Yes, sir.

Q. Now, as to Respondents' Exhibit, for identification, 173-A, wiii you tell us whose signature that is appearing in facsimile form?

A. That is also Mr. Lundborg's signature.

Q. And as to the initials appearing in the lower left corner?

A. The first initials are those of the dictater, Mr. Lundborg, and the second initials I am not familiar with, but,

again, they are probably the initials of the steno-
16958 rapher who took the dictation of this letter.

Q. You accept them as such?

A. Yes, sir.

(RESP. EXS. 172-A, 172-B, 173-A, and 173-B, were offered and received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Leisure:

Q. You explained what was done with the share of these funds, Mr. Reiter, that was distributed to members. What, if anything, was done with respect to the pro rata shares of non-Institute members?

A. The pro rata share of non-Institute members was returned to them by check.

Q. You have explained as to the organization set-up of N.R.A. compared with the Institute.

What have you to say, if anything, as to the functions of the Code and the functions of the Institute, Code Authority, whether they were separate or the same?

A. They were entirely separate, Mr. Leisure.

Q. And what about the powers and activities?

A. They were also entirely separate and distinct.

16959 The witness identified Resp. Exs. 174 to 176 A-B as correspondence in November and December, 1934, between the chairman of the Code Authority, the president of The Cement Institute, the chairmen of the Labor Committee and a Mr. Kratz who was an employee of Peerless Portland Cement Company at Detroit, Michigan.

Mr. Leisure: I offer them in evidence.

16964 By Mr. Leisure:

Q. Mr. Reiter, did the Cement Institute have anything at all to do with the administration of the N.R.A. cement code?

A. Nothing at all.

Q. Did it have any control over or any interest in the policies or practice of its—

16965 Mr. Paulson: I object. Pardon me, Mr. Leisure, go ahead; I am sorry.

Q. —or prices of its members?

16966 Q. Mr. Reiter, during the time that you were head of the Institute in Chicago, did you at any time try to set the prices to be filed by the members with the Code Authority, in any way?

A. No, sir.

Q. Did you have any connection with it in any way?

A. No, sir.

16969 Q. Mr. Reiter, did you have anything to do while you were head of the Institute in Chicago with the policies of the various companies in their filing of prices with the Code Authority?

16970 A. No.

By Mr. Leisure:

Q. Did you have, while you were acting in that capacity,—did you exercise or attempt to exercise any disciplinary powers over any member companies?

A. I did not.

16971 (RESP. EXS. 174, 175, 176-A, and 176-B were offered and received in evidence.)

16973 By Mr. Leisure:

Q. Mr. Reiter, this morning when you were testifying as to how you handled your funds, and I think 16974 you testified that they were handled separately, as to the Code Authority and the Institute, did the Code Authority at any time within your experience get any instructions from the N.R.A. as to how such funds should be collected from the members and how it should be used? I now show you Exhibit 170-A and B, for identification, if you care to refresh your recollection. (Handing document to the witness.)

A. Yes, we did have such instructions from the N.R.A.

Q. And did you follow those instructions, Mr. Reiter?

A. We did.

Q. When you say you received such instructions, I show you Exhibit 170-A and B, again, and ask you whether or not you received them in that form?

A. Well, this release of the National Recovery Administration was received by the Code Authority of the Cement industry and we followed such instructions as we received in that manner.

Trial Examiner Norwood: Is that all the instructions you had on the subject from them?

The Witness: I beg your pardon?

Trial Examiner Norwood: Is that all the instructions that you had on that subject from them?

The Witness: I don't remember whether or not we had any additional instructions on that matter.

16975 By Mr. Leisure:

Q. Mr. Reiter, when you were reappointed, as you have described, as manager of the Chicago Division, will you tell us whether or not there were already in existence any drafts of the proposed Code of Fair Competition for the Cement Industry?

16976 A. Several such drafts had already been prepared.

Q. At the time that you were reappointed?

A. Yes, on August 1, 1933.

Q. Now, can you tell us whether or not at that time any proposed code had been submitted to the N.R.A. officials? I am referring to the period of, say, July, 1933.

A. There was a draft or proposed code submitted to N.R.A. in July, 1933.

Q. And were there any subsequent revisions of those, to your knowledge, Mr. Reiter?

A. There were several revisions of that draft, both at the instigation, primarily, of the N.R.A. officials.

Mr. Leisure: Mr. MacIntyre, have you the exhibits here? I would like to refer to the original Commission's Exhibit 2603, if you have it there?

Mr. MacIntyre: I do not have 2603 here, Mr. Leisure.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Leisure: Have you got Commission's Exhibits 608-A to J, Mr. MacIntyre? I would like to refer to the original on that if you have it?

Mr. MacIntyre: Yes, I have that (handing document to counsel).

Mr. Leisure: Thank you.

16977 By Mr. Leisure:

Q. Mr. Reiter, I would like to direct your attention to Commission's Exhibit 608-H to J (handing documents to the witness). Just so the record will be clear, what is that, Mr. Reiter?

(Witness examines exhibits.)

Q. Perhaps we can save some time. Do you recognize it as minutes of the meeting of the board of directors on August 15, 1933?

A. Yes, sir.

Q. Now, was Marquette's letter, Commission's Exhibits

2603-A to F, considered at this meeting? I will show you the letter (showing document to witness).

The Witness: May I have the question?

(Last question read.)

A. Yes, it was, Mr. Leisure.

Q. What, if anything, was done with respect to that, Mr. Reiter?

A. The various items in Marquette's letter, being Commission's Exhibits 2603-A to F, were considered, and some changes in the current draft of the code were made to correspond to suggestions contained in the letter from Marquette.

16978 Q. That is, these revisions were made on the basis of Marquette's criticisms, Mr. Reiter?

A. Yes, sir.

Q. Will you look at Exhibit 2603-A to F? Is that the one you have?

A. Yes.

Q. Mr. Reiter, on your direct your attention was called to Commission's Exhibit 556 which, as I recall, was a proposed code of fair competition for the cement industry under the N.I.R.A. Do you know who proposed this code?

A. The Cement Institute or a committee of the Cement Institute, inasmuch as they were handling the submission of a code for the industry to N.I.R.A.

Q. Did this committee represent a small portion or most of the members of the industry?

A. Most of the members of the industry; in fact, a very large percentage of the industry.

Q. Now were any public hearings held on the N.R.A. cement code?

A. Yes, sir, a public hearing was held, I believe, September 15 and 16, 1933.

Q. Can you tell us whether or not interested parties had any opportunity to state their suggestions or criticisms?

A. They did.

16979 Trial Examiner Norwood: Did you answer that from your own knowledge, or from hearsay?

The Witness: I answered it from my own general knowledge as to how such hearings were conducted.

I was not present at this particular hearing, Your Honor.

16980 By Mr. Leisure:

Q. Have you attended such hearings, yourself, in person?

A. I have; several of them.

Q. Do you know whether or not of your own knowledge interested parties did have the opportunity during the formation of this code to state their objections and suggestions and criticisms?

A. Yes, sir, I do know.

Q. Do you know that of your own knowledge?

A. Yes, I do know it of my own knowledge.

Q. Were there any further revisions of the proposed code made at any time because of criticisms or suggestions from the N.R.A. officials, if you know?

A. There were further revisions made at the suggestion of N.R.A. subsequent to this public hearing in September, 1933.

Q. Now do you know what date—first of all, do you know whether or not President Roosevelt gave his formal approval to the code of fair competition?

A. Yes, he did.

Q. Do you know when that was?

A. On November 27, 1937.

Q. Subsequent to that date were there any further revisions made, Mr. Reiter, to your knowledge?

A. There was a revision of the code made which became effective on May 21, 1935.

16981 Q. Now including all of this period that you have been describing and including the revisions, did the N.R.A. code as adopted contain any restrictions as to whether or not any producer could file at delivered or f.o.b. mill prices?

A. It contained no restrictions at all of that nature.

16982 Q. Mr. Reiter, now taking up some of the important provisions of the Code which you discussed with Mr. Wooden on your direct examination, the first of these that you discussed with him was, I think, the question of open price filing. I think you have already said that that provision was contained in Article IX of the Code; is that a correct statement?

A. That is true.

Q. On this subject, as you discussed it, do you recall what Article IX did provide, Mr. Reiter?

A. Article IX provided for an open price plan.

Q. Now, what restriction, if any, was there upon the amount and type of prices that members of the industry could make and file?

16985 Q. Having in mind, if you do recall, your testimony on direct.

A. The Code Authority did not attempt to restrict any filing, any price filing, of a member of the industry, whether it was f.o.b. destination or f.o.b. mill, providing that

16986 filing was definite.

By Mr. Leisure:

Q. What do you mean by "definite," Mr. Reiter?

A. I mean that all conditions affecting that price, and being a part of that price, should be fully stated so that other members of the industry could avail themselves of the privilege extended by the Code of meeting a price filed by a competitor.

Q. That is, that it should be understandable?

A. Exactly.

16987 Q. What did you do, Mr. Reiter, at that time, with respect to the Code, open price provisions, which required the members to file their prices? What did you do with it? How did you consider that at the time?

16988 A. When we received a filing of price and terms by members of the industry we distributed that information to all other members of the industry who had filed—who had themselves filed prices for that same destination.

Q. Now how did you treat it when a seller had no price on file for delivery at a railroad station in Baltimore but a competitor had filed such a price? Did you consider it in accord with the code open price provision for the seller who had no Baltimore price on file to sell cement delivered at that same railroad station at the price at which his competitor had filed?

A. We considered that if he did so he was properly meeting the price filed by his competitor.

Q. But if he purported to meet competition, not by delivery at the railroad station, but he agreed to deliver at the job site in Baltimore by truck, what was the status under the code of his use of the rail price filed by his competitor?

A. The Code Authority did hold that that was a vio-

lation of the code unless the second manufacturer filed his own price for delivery by truck to the job site.

Q. You, of course, understand I am not talking about any specific case; I am giving you the principle of two situations and you have given me from your knowledge of the situation how the thing would have been done, is that so?

16989 A. That is correct.

Trial Examiner Norwood: I would rather know how the thing was done.

By Mr. Leisure:

Q. Did you have just such cases, Mr. Reiter, as the two cases that I have given you?

A. Yes, sir; several times.

Trial Examiner Norwood: You can't tell us what would have been done.

By Mr. Leisure:

Q. And have you described to us, Mr. Reiter, how you handled such situations when that type of situation did arise?

A. Yes, sir.

16990 Q. Mr. Reiter, do you remember being asked questions concerning the notifying of members of filed prices on direct examination when Mr. Wooden examined you?

A. I do.

16992 By Mr. Leisure:

Q. But, Mr. Reiter, will you tell us whether or not you notified members of the prices which had been filed?

A. Yes, we did, Mr. Leisure.

Q. Pursuant to what authority was that?

Trial Examiner Norwood: As you understood it.

A. No specific authority in words, under the code, except that the code gave the specific right to members of the industry to meet prices filed by others and we didn't know how they could meet prices filed by others without being told what prices were filed.

By Mr. Leisure:

Q. Now when you said there was no specific provision in the code, which code did you have reference to, Mr. Reiter, the first or second code?

A. The code which became effective on December 7, 1933.

Q. With references to your answer, was there any differences between the two, in this regard?

A. The code which became effective May 21, 1935, specifically directed the Code Authority to distribute prices filed to members of the industry.

Q. Now, Mr. Reiter, do you know whether or not the code authority was supervised by any deputy N.R.A. administrator?

A. Yes, there was always a deputy administrator in charge of our code.

16993 Q. And what, if any action did he take with respect to the open price filing?

The Witneses: May I hear the question again?

Trial Examiner Norwood: Read the question.

(Question read.)

A. The deputy administrator in charge of our code was constantly advised of what the Code Authority was doing and in this particular instance he knew that we were advising the members of price terms filed by other members of the industry and he took no action attempting to cancel or stop what we were then doing.

16994 Trial Examiner Norwood: Was it his duty to keep informed about that, supervise it?

The Witness: Your Honor, we had frequent meetings always with the Deputy Administrator or the administrative member of the Code present who was directed to keep the Deputy Administrator advised. The Deputy Administrator got copies of all letters which we wrote from the Code Authority.

By Mr. Leisure:

Q. Now, Mr. Reiter, what was the practice as to which members of the industry were notified by the Code Authority of the prices which were filed?

A. We notified all members of the industry who had, themselves, filed a price at a particular destination of any change filed by another at that destination.

Q. And how did you select these members? Why did you select them as you have described?

A. We selected them in that manner because we thought that that was a fair decision as to what members of the industry were interested in such a price and it would have

been too expensive and too laborious for us to advise all members of the industry, irrespective of interest.

Q. And would you sometimes have specified requests for a price at any given destination, Mr. Reiter?

A. Yes, we had many such requests.

16995 Q. Now, when there was such a specific request for a price at a given destination, how was that information supplied, or was it supplied, in view of the fact that the particular company had not filed a price at that destination?

A. Upon request that information was supplied to any member of the industry whether or not he had a price on file for that destination.

Trial Examiner Norwood: Well, now, were these filed prices open to the public?

The Witness: Yes, sir.

By Mr. Leisure:

Q. Now, on the direct examination under the topic of discussion with Mr. Wooden as to definite filings, you stated that the Code Authority got definite filings; what have you to say, if anything, Mr. Reiter, as to whether or not these filings were definite?

16996 Mr. MacIntyre: —may we inquire as to what filings that we are now talking about?

Trial Examiner Norwood: Yes.

Mr. Leisure: Well, I will show you,—if there is any question about that I will show Mr. Reiter the exhibits.

By Mr. Leisure:

Q. I will show you, Mr. Reiter, Commission's exhibits which Mr. Wooden put in evidence on this point, Exhibits 1008-A, 1008-B, 1008-C, 1008-D, 1008-E, 1008-F, 1008-G, 1008-H and 1008-I (showing papers to witness).

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: May I hear the question?

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Q. Now, on the direct examination under the 16997 topic of discussion with Mr. Wooden as to definite filings, you stated that the Code Authority got definite filings; what have you to say, if anything, Mr. Reiter, as to whether or not these filings were definite?")

A. The price filings with the Code Authority were required to be definite as to all terms and conditions affecting the price, or they were not received as filings by the Code Authority.

By Mr. Leisure:

Q. And do the exhibits which you have just been shown, Mr. Reiter, refer to that subject, as to definite filings?

Trial Examiner Norwood: You may answer that question.

A. Yes, sir; these exhibits all refer to that point.

By Mr. Leisure:

Q. Did you consider it at the time, Mr. Reiter, and, if you did, will you tell us how you considered it, as to whether or not it was necessary for them to be definite?

A. We quite positively held that it was necessary for such filings to be definite so that competitors would know what to meet under the privilege granted them by the code.

Q. Did you consider, at the time, that if a price was filed, say, for $2, and that did not violate the terms and conditions of sale—would you consider that, and did you at the time, as meaning a definite filing?

16998 A. Not as you have stated it, Mr. Leisure.

Q. Did you consider at that time that such a price had any meaning or gave any information to a competitor?

A. Well, it had insufficient meaning in our opinion to have been accepted as a filing.

Q. How did you consider it at the time, Mr. Reiter, as to whether it was necessary to know the unit that was offered? I mean by that, of course, the barrel or sack, or what unit was offered.

A. Well, of course, it was necessary to know the unit covered by the price filed.

Trial Examiner Norwood: Well, that is part of every price quotation, there could not be a quotation without that.

By Mr. Leisure:

16999 Q. And would it or would it not be necessary to know whether it was standard cement, or high-early strength for instance?

A. It certainly would be necessary to know that.

Q. And would it or would it not be necessary to know the type of package?

A. Yes, it would be necessary to know that.

Q. And would it or would it not be necessary to know as to the cash discounts?

A. Yes, sir.

Q. You were examined by Mr. Wooden on another subject—

Mr. Leisure: Page 3825 through 3835 of the record, Mr. MacIntyre.

Q. —with reference to the Code Authority's activities in notifying companies which did not have on file a price the same as the general price filed to a given destination.

Can you tell us how long this activity continued, Mr. Reiter?

A. It is my recollection that I testified on direct, and I reaffirm that statement, that this was done because of the need for additional and unskilled help in entering this mass of filed prices on our filing cards, at the time the Code was started, and it was continued until we felt reasonably satisfied that the prices on file reflected the desire of the person who had filed them—correctly reflected that desire.

Q. Do you remember any instance where a 17000 manufacturer did not change his price when the matter was called to its attention?

A. There were a number of such instances.

Q. Now, again, at page 3053 of the record, on direct examination, you testified that some f.o.b. mill prices were filed during the N.R.A. Code. I would like to ask you whether or not the Code Authority during the N.R.A. Code, and the Trade Practice Committee thereafter, ever accepted the price filings of f.o.b. mill prices?

A. Yes, sir; the price filings were—f.o.b. mill—were accepted by both the Code Authority and the Trade Practice Committee.

Trial Examiner Norwood: Were there many such filings?

The Witness: Yes, Your Honor, there were a considerable number of such filings. I would estimate that filings f.o.b. mill either restricted to, in some way, or unrestricted, were filed at more than 25 mills in the country.

Trial Examiner Norwood: How?

The Witness: F.o.b.

Trial Examiner Norwood: Yes.

The Witness: At least 25 mills in the country.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

17001 Q. When you say "restricted," will you explain what you mean by that term, Mr. Reiter?

A. Well, sometimes a price f.o.b. mill was filed f.o.b. truck at mill, or f.o.b. barge at mill.

Q. Did either the Code Authority or the Trade Practice Committee direct or attempt to direct any companies to make these filings which you have just explained to the Examiner?

The Witness: May I hear that question?

Trial Examiner Norwood: Read it.

(Last question read.)

A. No, sir; we did not.

By Mr. Leisure:

Q. Now, again, on page 3813 of the record, and thereafter, you were asked by Mr. Wooden whether you considered it a violation of the code if a member did not file mill prices, and, as I recall your answer at that time, it was that it did not—your answer was "No."

Will you explain your answer and tell us whether or not it would be a violation of the code if a member used mill prices?

17002 A. Well, it would be a violation of the code if a member of the industry used a price f.o.b. mill which was not on file with the Code Authority and, as I recollect it, that is what my previous answer was directed towards.

Q. Did you consider at the time that the manufacturer had to file part of the prices or all prices which it used when those prices were mill prices or destination prices?

A. He had to file all prices which he used.

Q. Again on page 3817 you were asked the following question:

"Q. You consider price as the figure at which goods change hands. That includes what the seller actually receives for his product and what the buyer pays to the seller."

I would like to ask with respect to that question, when you were asked what you considered, do you consider if the amount actually received by the seller was different from the amount paid by the buyer, what would you consider the price to be then?

A. I would consider that the price was the amount paid by the buyer.

Q. And you so considered it during your activities that you have been describing to us?

A. In the Code Authority?

Q. Yes.

A. Yes, I so considered it at that time.

17003 Q. Now, Mr. Wooden asked you further about the filing of truck conditions, page 4154, and, thereafter, he asked you whether the Code Authority and the trade practice committee provided for the filing of truck conditions and notifying others. I think you said that they did. What was the reason for filing such conditions, Mr. Reiter, if you know?

A. Well, the sale of cement for delivery by truck was quite different than the sale of cement for delivery by rail, and, therefore, following the practice of the Code Authority to require definite filings, such conditions must and were necessarily filed.

Q. And what was your experience at the time as to whether or not the companies were free to file truck conditions at any time, if they chose to do so?

A. Well, they were entirely free, of course, and did make many such filings.

Q. What was your experience during that time as to whether the Code Authority criticized or disapproved any type of filing as long as it was sufficiently definite for competitors to be able to meet the filing?

A. They made no criticisms of any filing which was sufficiently definite for competitors to meet and which did not violate any other provisions of the code.

Q. Mr. Wooden discussed with you a 5-day waiting period on your direct examination. In fact, he
17004 asked you questions with regard to the provision in the N.R.A. code.

I would like to call to your attention, those provisions; the first of those appearing on page 3053.

You testified that the code, as approved, provided for the filing of prices five days before they became effective. Mr. Reiter, do you know the purpose of this five day waiting period?

A. Well, it was merely to give the Code Authority an opportunity to notify competitors of the company filing of prices filed so that he could have knowledge and meet that filing at the same time it became effective if he elected to do so.

Q. Again, on that same subject, further on in the record, page 3692, Mr. Wooden asked you whether this five day waiting period was followed in filing prices with the trade practice committee and you answered that the committee followed the same procedure as that of the Code Authority. Can you tell us whether or not the companies observed the five day waiting period after the expiration of N.R.A.?

A. Well, some companies did not file at all; some filed after they had made the price effective, and a few did, however, file for a short time, with a five day waiting period.

Q. You were also asked whether the same procedure was applied when land grant rates were filed. Was any waiting period involved in the filing of land grant rates?

17005 A. No; none at all.

Q. And were any complaints filed with the trade practice committee because the company used a price before it had been on file for five days?

A. I remember none, Mr. Leisure.

Q. And do you know of any instance under the trade practice committee where the company wanted to make a price effective immediately but felt bound to wait until its price had been on file for at least five days?

A. I don't know of any such case.

17012 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Will you please state, Mr. Reiter, as precisely as you can, what the document is marked Respondents' Exhibit; for identification, 170-A and B (handing document to the witness)?

A. It is a mimeographed copy of an official release of the National Recovery Administration issued under date of May 21, 1934, and copied in the office of the Cement Institute at New York.

17013 Q. Well, can you state in what manner it was handled by the N.R.A.?

A. The N.R.A. issued a number of releases and whether or not they went to the press, I don't know; but they were sent to all Code Authorities, apparently, at any rate, the Code Authority for the cement industry received them and a number of members of our industry also received such releases.

Q. Did you receive, along with this, or did any of the Code Authorities, to your knowledge, receive along with this, from the N.R.A., any definite statement that the Code Authorities, themselves, would be bound by anything that is said in it, and that they should be controlled by anything that is said in that document?

A. The Code Authority did receive from the N.R.A. certain administrative orders, and I do not recollect whether there was received an administrative order of this
17014 same nature or not, Mr. MacIntyre.

Q. But I am talking now about,—with this document did you receive or did any Code Authority, to your knowledge, receive from the N.R.A. any statement that any Code Authority was expected to be governed by what was contained in this document, Respondents' Exhibits 170-A, B (referring to papers)?

Q. (Resumed) —that could be looked upon by the Code Authority, or any member of any Code Authority, as to whether or not any of the contents of this document should be controlling upon such code authorities?

A. The Code Authority—

17015 The Witness: Shall I answer, Your Honor?

Trial Examiner Norwood: Yes.

A. The Code Authority for the cement industry received this document in a different form, directly from the N.R.A., and I do not recollect whether any order, or any other paper accompanied this release or not.

By Mr. MacIntyre:

Q. This is not in the form, then, in which it was received, do I take it?

A. It is a verbatim copy.

17016 By Mr. Leisure:

Q. Now, Mr. Reiter, on direct examination you also testified with respect to the suspension of Article XI of the Cement Code. The testimony appears to be the effect that after having been interpreted by the Code Authority, this section was suspended, and that certain negotiations were carried on between the dealers, the Code Authority, and the manufacturers' Code Authority, for the purposes of arriving at this Article XI.

In that connection I would like for you to look at—

Mr. Leisure: May I have marked for identification a letter dated September 17, 1934.

17017 The witness identified Resp. Ex. 177 as a letter to him, as Secretary of the Code Authority, dated September 17, 1934, from Leon Henderson of the Division of Research and Planning of the NRA: Resp. Ex. 178 A-B as a letter dated September 17, 1934, in reply to Mr. Henderson's letter of the same date; Resp. Ex. 179 A-B as a letter dictated by him, from the Chairman of the Code Authority dated November 28, 1934, and addressed to W. A. Janssen, Deputy Administrator of the NRA.

17019 Mr. MacIntyre: I would like to ask the witness a question about these, if Your Honor please.

Trial Examiner Norwood: Go ahead.

*Examination on Voir Dire by Mr. MacIntyre.*

Q. Do you know what became of the original letter from Mr. Henderson of which Respondents' Exhibit, for identification, 177 is a copy?

A. No, I do not know that.

Q. Do you recall ever having seen the original?

A. I remember the reply is written by myself, there, and so I must have seen the original and replied to the original.

Q. But you do not know where it is now?

A. I do not know where it is.

Q. Do you know whether or not you sent it to any one of the people whose names appear at the lower left-hand corner of 177?

A. It was customary to send copies of such letters to members of the Code Authority and the deputy administrator and the administrative member of the code and attorneys and those are the names listed there and I have no doubt copies were so sent.

Q. You don't know whether the original was
17020 sent to Mr. McFadden or Mr. Conn. or Mr. Coffin, do you?

A. That wouldn't be the custom. The custom was to retain the original in our file and send copies to those shown.

17021 (RESP. EXS. 177, 178-A, and 178-B, were offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Reiter, I wish to direct you to Respondents' Exhibit 179-A and B, for identification.

Do you recall, Mr. Reiter, the subject-matter of Article XI of the N.R.A. cement code?

A. Well, generally, I do, yes.

Q. Just explain so that the record will show as to your following answers, what it was, please.

A. Article XI of the N.R.A. code prescribed the marketing practices for the industry.

Q. Was that article, Mr. Reiter, as incorporated into the code, the substance of it, was it something new or was it an expression of custom of long standing in the industry?

17022 A. Article XI prescribed marketing conditions which had long existed in the cement industry.

By Mr. Leisure:

Q. And as to Article XI did these provisions ever go into effect Mr. Reiter?

A. Yes, they went into effect with the effective date of the code, December 7, 1933, and continued for a time until suspended.

Q. Prior to the suspension that you have mentioned of Article XI, did you ever receive any notice from N.R.A. as to whether these protests had been received and the cement industry would be heard on any questions of whether this article should be suspended?

A. Well, the original suspension of Article XI was made by the administrator without notice to the Code
17023 Authority of the Cement Institute, whereupon the Code Authority made a protest and provision for a public hearing on the suspensions was made and the second suspension then went into effect some—well, in the latter part of January, 1934; I think about January 23 or 24.

Q. And was that a final suspension? I mean by that, was it ever reinstated after that, or was it a final decision at that time?

A. It was never reinstated and that was the final action on Article XI.

Q. Now on your direct examination, Mr. Reiter, you testified as to certain conferences which were held after Article XI had been suspended, with a view to reinstating it.

Was the Cement Institute represented at any of these conferences? Who attended the conferences; suppose we put it that way?

A. Well, if you refer to conferences between the Code Authority for the Cement Industry, and the Code Authority for the dealers, then the Cement Institute was not represented at any such conferences.

Q. Will you explain to the Examiner why the conferences were held, then?

A. They were held at the direction of the deputy administrator in charge of our code at that time and he stated that the purpose of his request to attempt
17024 to have the two Code Authorities, together with contractors, work out a new Article XI which would be satisfactory to all parties.

Q. And was the N.R.A. kept advised at all as to the progress of those negotiations?

17025 A. The N.R.A. was kept advised of these negotiations.

By Mr. Leisure:

Q. Do you know whether or not the Dealers Code Authority actively participated in attempting to se-
17026 cure a reinstatement, or any revision of this Article XI, Mr. Reiter?

A. They actively participated in both, Mr. Leisure.

Q. Were you in any position to observe at that time, Mr. Reiter, as to whether they were more active than the Cement Code Authority?

A. Well, I was present at the public hearing on the suspension of Article XI. I knew, and was present at these negotiations, or at least some of them between the Cement Code Authority and the Dealer Code Authority, and, in my opinion, the Dealer Code Authority was quite active, both in the suspension or causing the suspension of Article XI, and in the efforts to reinstate it.

Trial Examiner Norwood: What changed their minds about that, if you know?

The Witness: As to the suspension of Article XI, the marketing practices for the industry varied in all parts of the country, and became unsatisfactory to the dealers, themselves, until such time as they thought they were better off with Article XI of the Cement Code than they were without any article on marketing practices.

By Mr. Leisure:

Q. And then, Mr. Reiter, after the N.R.A. Code had been declared unconstitutional, in your experience were

there any manufacturers and dealers conferring to
17027 determine a distribution policy agreeable to both?

A. Well, I knew of no such conferences, Mr. Leisure.

Q. You were shown Commission's Exhibit 1019-A to S, being certain letters which are interpretations of Article XI, dated December 19, 1933, and January 13, 1934. Do you know whether or not these dates preceded the permanent suspension of Article XI, as you have described?

A. They do; yes, sir.

Q. And then after January 24 do you know whether the Code Authority attempted to interpret or to enforce the suspended Article XI in any way?

A. It no longer interpreted Article XI, or attempted to enforce its provision.

Q. Now, did the Code Authority receive any correspondence from members of the industry after that date with reference to matters that might have fallen within the purview of that article?

A. I remember that it did receive some communications regarding it.

17028 The witness identified Resp. Exs. 180 and 181 as correspondence between the Chairman of the Code Authority and members of the Cement Institute concerning Article XI after it had been suspended.

Q. Before I offer them, Mr. Reiter, what was the policy of the Code Authority with respect to such requests after suspension of Article XI?

A. It did not make any interpretations of Article XI, nor did it attempt to enforce Article XI, and it so advised its members.

Q. Do these exhibits represent the manner in which the Code Authority handled advice as to dealer policy after the suspension of Article XI, Mr. Reiter?

A. Yes, they are a typical example.

17029 Q. There is considerable testimony, starting with page 3037 of the record, concerning Article X, paragraph 4(g) of the N.R.A. Code, which has to do with shipments by transportation agencies giving rebates. Will you explain, for the record, the purpose of this clause, Mr. Reiter?

A. The purpose of that clause was to make the open price provisions of the code effective.

Q. Did you consider if a manufacturer purported to sell cement at a filed destination price of $2 and the transportation agency paid the buyer 20 cents, would that have been a violation of the code?

A. It would have secured cement at a price other than that filed by that member of the industry, and, therefore, would have been a violation of the code by that member.

Q. Now, there was further testimony on your direct, concerning some discussion of trucking under the N.R.A. code. Can you tell us whether the Code Authority received filings involving trucking terms and conditions?

A. Very frequently.

Q. And did the Code Authority have any objections to receiving trucking terms and conditions?

A. None whatsoever so long as they were definite.

Q. You have used the term "terms and conditions, truck conditions." Will you explain what you
17030 mean by filing truck conditions?

*Examination on Voir Dire.*

By Mr. MacIntyre:

Q. Mr. Reiter, I do not believe I recall what you gave as the identification in the way of testimony—of the
17031 identification of Respondents' Exhibit, for identification, 180-E; will you please state what that is again?

17032 A. I believe it was an attachment to Respondents' Exhibit 180-B and C. In fact, it is stated in that exhibit that that is an attachment.

Q. Do you know of your own knowledge whether or not Respondents' Exhibit, for identification, 180-E is the attachment that is referred to in Respondents' Exhibit, for identification, 180-B and C?

A. Well, inasmuch as it is now detached, I could not be sure it was the attachment referred to in there. I have no doubt, inasmuch as it appears to state a selling policy of a cement company that it is the attachment referred to in that letter, but I have no direct knowledge.

Q. Have you seen other copies of statements of selling policies of a similar character to that other than this sheet here?

A. Yes, I have seen other sales policies.

Q. Would they fit just as well as this one as an attachment to this letter, as described in the letter?

A. I haven't read this sales policy through. I see the subject which it covers and those are the subjects frequently covered in sales policies of member companies.

Q. Of other companies other than the Republic Portland Cement Company?

A. Yes.

Q. I notice at the top of 180-A to E there was some typing put on there at a different time than the other typing was put on there; some being in carbon copy and some in direct typing. Will you state whether or not it was on there when it was received?

17033

Mr. Leisure: I object to that question. Counsel couldn't possibly know whether it was put on at the same time or at another time.

Trial Examiner Norwood: The objection is overruled.

A. I do not know.

By Mr. MacIntyre:

Q. You don't know whether it was on there when it was sent out by the Republic Portland Cement Company or when it was received by Mr. B. H. Rader of the Cement Institute of Chicago?

A. No, I do not.

Q. Do you know whether or not this part near the center of the page X'd out and typed in after that "owners or contractors doing work sell direct" was on there when it was received by Mr. Rader in Chicago?

A. I do not know, no.

Q. Do you know whether the words that are in in pencil or partially in pencil handwriting, on the bottom of the page were on there when it was received by Mr. Rader?

A. No, I do not know that.

17036 Washington, D. C.,
March 3, 1939.

17039 GEORGE H. REITER thereupon resumed the stand and testified further as follows:

*Examination on Voir Dire by Mr. Wooden.*

Q. Was the Republic Portland Cement Company a member of the Institute at the time that this letter was written in 1934 (having reference to Respondents' Exhibits 180-B and C)?

A. Yes, sir.

Q. And throughout that year?

A. And throughout that year.

Q. Did you know Larry O. Cox whose name appears to be signed to Respondents' Exhibit, for identification, 180-C?

A. I think I met him once, Mr. Wooden.

17040 Q. Can you say where and when?

A. No, I don't remember.

Q. Was it at some meeting of a group of cement manufacturers?

A. I can't say.

Q. You know there was such a person as Larry O. Cox?

A. Yes, I do.

Q. And do you know him as an officer of the Republic Portland Cement Company?

A. Yes, sir.

Q. What office did he hold?

A. He was president of the Republic Portland Cement Company, if I am not mistaken.

Q. 180-C indicates him as vice-president and sales manager.

A. Then I am mistaken.

Mr. Wooden: I offer no objection to the exhibit, Your Honor.

Trial Examiner Norwood: Received as marked.

(RESP. EXS. 180-A, B, C, and D, and 181 were offered and received in evidence.)

Trial Examiner Norwood: I shall retain 179-A and B. I didn't have an opportunity to examine it over the recess. Go ahead.

*Cross Examination by Mr. Leisure (Continued).*

Q. Mr. Reiter, on your direct examination Mr.
17041. Wooden referred to sections 4, Article X of the N.R.A.—

Mr. Leisure: Pages 3037 and thereafter, Mr. Wooden, of the record.

Q. (Continuing) —section 4, Article X, of the N.R.A. Cement Code and a similar provision in the compendium and indicated that the Cement Institute took some action with respect to whether or not members trucked cement or as to whether or not the Institute was interested or took some action with respect to that.

What are the facts, Mr. Reiter? Did the Institute take any action with respect to trucking?

A. Well, if this refers to a particular article and section of the code, I don't recollect what it is. May I see that?

Q. Certainly. I referred to Article X, section 4, of the N.R.A. Cement Code (handing document to the witness).

Mr. Wooden: What was that page number?

Mr. Leisure: Of the record?

Mr. Wooden: Yes.

Mr. Leisure: That appears, Mr. Wooden, on page 3037 and pages following thereafter; your examination on that subject.

A. May I have that reference to the code article and section again?

By Mr. Leisure:

17042 Q. Article X, section 4, Mr. Reiter.

A. There should be a letter reference as well, inasmuch as section 4 is a section consisting of a number of paragraphs marked by letters.

Q. Will you direct your attention to sub-paragraph (g) of that section, Mr. Reiter? It is on page 339 of the Cement Industry Code.

A. Now may I have your original question?

Q. My question was whether or not the Cement Institute took any action with respect to trucking.

A. No, sir, they did not.

Q. Did the Cement Institute take any action in connection with any discontinuance of trucking of cement by cement producers?

A. No, sir, it did not.

Mr. MacIntyre: Are we now asking for the witness' knowledge on this or some statement as to what somebody might have told him?

Trial Examiner Norwood: I think he is asking him for his knowledge.

By Mr. Leisure:

Q. And did it take any action with respect to the charging of the differential on cement delivered by truck?

A. No, sir.

17043 Q. Did the Institute, Mr. Reiter, or the Code Authority, to your knowledge, ever make any objection to trucking as a method of delivery?

A. No, sir.

Q. Now, did the N.R.A. Cement Code contain any provision with reference to drafting any plan for dividing available business among the members of the industry?

A. The first N.R.A. Code provided for the drafting of such a plan, and the submission of such a plan to N.R.A. for approval.

Q. Now, you mentioned the first N.R.A. Code. Was there any difference with respect to the second N.R.A. Code?

A. The second N.R.A. Code provided no such plan.

Q. And what, if any, effort—

The Witness: Allow me—may I correct that answer?

Trial Examiner Norwood: Yes.

Mr. Leisure: Yes.

A. The second N.R.A. Code did not provide for the drafting of any such plan for submission to N.R.A.

By Mr. Leisure:

Q. What, if any, efforts were ever made to prepare such a plan, Mr. Reiter, following what you have just said?

A. Well, a number of efforts were made to prepare such a plan, and I was present at one meeting where I believe the final draft was submitted to members of the In-

17044 stitute, and all such plans, as drafted, and submitted to members of the Institute, failed of adoption, for the reason that the members of the industry did not agree to any such plan, each member of the industry, apparently, believing that he was entitled to more of a share of the available business than any plan provided.

Q. And I take it from what you have said, Mr. Reiter, that no plan was ever adopted, then?

A. That is correct; no plan was ever adopted.

Q. Now, I would like to take up with you the question of whether or not the Code Authority handled any specific complaints against members of the industry.

First, let me ask you, were there any such complaints?

A. Yes, sir; there were.

Q. And how were they handled?

A. They were handled by the Code Authority almost entirely through correspondence, with the complainant and the respondent to that complaint.

Q. The correspondence that you have described, did that ever come to the attention of the Administrator, or Deputy Administrator of the N.R.A.?

A. When, after any investigation in that matter, the Code Authority reached the opinion that a violation of the Code had occurred, it referred the entire file to the
17045 Compliance Division of N.R.A. with the Code Authority's findings for such action as the Compliance Division cared to take.

Q. Do you know whether or not this method was approved by the N.R.A. Administrator or the Deputy Code Administrator?

A. That method was following the instructions of N.R.A.

The witness identified Resp. Ex. 182 as the N.R.A. manual which he just referred to, copies of which he had received from the N.R.A. itself and by which he was guided in his activities.

17046 Mr. Leisure: I would like to have marked for identification bulletin No. 1, dated January 9, 1934.

(Thereupon a certain bulletin was marked Respondents' Exhibit No. 183-A, 183-B, 183-C, and 183-D, for identification.)

17048 (RESP. EX. 182 was offered and received in evidence.)

The witness identified Resp. Ex. 183 as a bulletin from himself, as Secretary, dated June 9, 1934 to all members of the industry.

17049 (RESP. EX. 183-A, 183-B, 183-C, and 183-D was offered and received in evidence.)

By Mr. Leisure:

Q. Does this exhibit, Mr. Reiter—will you look at it, and explain to the Examiner whether it accurately summarizes the status of the complaints made to the Code Authority as of that date?

A. It did, yes, Mr. Leisure.

Q. Now, I would like to direct your attention to Commission's Exhibits 986-A to C, being correspondence between Code Authority and the Aetna Portland Cement Company in May of 1935, and where reference is made to the use of a destination cost filed as a destination price without the attached terms and conditions applying to the price. Will you look at it and explain to the Examiner what is involved in that transaction, if you know?

17050 (The witness examines document.)

A. Now may I have the question?

Trial Examiner Norwood: Read the question.

(Question read.)

A. In this case it was charged that the Aetna Portland Cement Company violated the N.R.A. Code by bidding a price not on file with the Code Authority as provided by the code:

By Mr. Leisure:

Q. Do you know what the nature of this alleged violation was, so that the transaction will be clear to the Examiner?

A. Yes, Mr. Leisure. There was on file for the destination in question a government destination cost with what has been called a control clause attached as a part of that filing, and the Aetna Company had a perfect right under the code to meet the filing as made, but, instead of doing so they bid in this case a destination price without any condition equal to the government destination cost as filed and they should not have done so without filing that price for that destination.

Q. Mr. Reiter, I want next to direct your attention to executive order No. 6646, and its modification of June 29, 1934, being Commission's Exhibit 179, which permitted manufacturers to quote prices as much as 15 per cent below their current prices on sales to the United States Government. Do you recall that?

17051 A. I recall that order.

Mr. Wooden: Read the question, please.

Trial Examiner Norwood: Read the question.

(Question read.)

By Mr. Leisure:

Q. Now what did you consider, if you did at all, the effect of such an order to be upon the open price plan contained in the N.R.A. Code, Mr. Reiter?

17053 A. My opinion was that this executive order operated to defeat the open price plan so far as it affected Government bids; but I would like to add that we nevertheless recognized the order and observed it strictly in the operation of the Code Authority.

By Mr. Leisure:

Q. Now, taking up another subject, Mr. Reiter, namely, the subject of cost accounting. I would like to show you the cost accounting manual, dated 1934.

Q. Mr. Reiter, would you look at Respondents' Exhibit No. 184, for identification, and explain to the Examiner, as briefly as you can, what it is?

A. It is a manual of accounting for the cement industry, prepared for and adopted by the Code Authority in 1934 pursuant to a provision of the code requiring them to do so.

Q. When you say "a provision of the code," let me direct your attention to the code and ask you if you
17054 have reference to section 3 of Article VIII (handing document to the witness)?

(Witness examines document.)

A. Yes, sir.

(RESP. EX. 184 was offered and received in evidence.)

Q. Mr. Reiter, to whom was this cost manual distributed, if at all?

A. It was distributed to all members of the industry, and then to many others outside the industry in addition to certain offices of the N.R.A.

Q. Now, do you know whether or not this code provision against sales below cost was ever enforced?

A. It was not enforced.

Q. I would like for you to look at Commission's Exhibit 320-E (handing document to the witness). You discussed that exhibit with Mr. Wooden. Can you tell the Examiner whether or not other similar telegrams were sent?

17055 (The witness examines document.)

A. Yes, sir. The exact—

Q. Will you explain to the Examiner the circumstances surrounding the sending of these telegrams, including Commission's Exhibit 320-E?

Trial Examiner Norwood: Let me see the telegram, if you don't need it any further.

(The witness hands a document to the Examiner.)

A. Telegrams identical to that were sent by the president of the Institute to all members of the industry.

They were occasioned, of course, by the Schechter deci-

sion of the previous day, by statements in the press by Donald Richberg and others in Government circles urging industry to adhere to the provisions—

Mr. Paulson: I object to characterizing the statements—

Mr. Leisure: Let him finish his answer, please.

A. (Continuing) —to adhere to the provisions of codes of fair competition, for the time being, and also intimating that a new N.R.A. was contemplated and would be shortly presented.

17057 Mr. Paulson: I believe the Commission has introduced in evidence the statement, one of the statements which Donald Richberg made upon which the Cement Institute purported to base this action, this action encouraging members to continue under the code; I think the statement is in evidence. If it is not, it should be, and no characterization of this witness, because the statement doesn't bear the witness out.

Mr. Leisure: Your Honor, will you hear me before we have a ruling? We have heard from both Counsel on the other side.

Trial Examiner Norwood: Certainly.

Mr. Leisure: Counsel for the Commission put in this telegram over our objection showing that certain action was taken.

Now, if we are deprived of showing why the action was taken, we are deprived of putting in any defense in this case.

Counsel opened the door, put the telegram in over objection. Surely we have a right to explain why we took the action we did take.

If we are not allowed to, we are deprived of putting in the other side of the case, we are deprived of putting in any defense.

17058 Trial Examiner Norwood: I think that, but I think you should put this Richberg statement in the right way.

Mr. Zimmerman: As I understand it is already in and this amounts to merely a reference to something that is in without quoting it exactly.

Trial Examiner Norwood: I think it would be just as valuable by striking everything in the answer after "urging industry—", except that it is based on Richberg's statement.

Mr. Zimmerman: That only identifies which statement he meant. If he could say based, of course, upon the statements made by Mr. Richberg which have already been received in evidence as Exhibit number so-and-so, it would be all right.

Trial Examiner Norwood: If it is struck from the record as evidence it will still have its reference value, there.

Mr. Leisure: If Your Honor pleases, may I state our position on this with respect to that?

Trial Examiner Norwood: Yes.

Mr. Leisure: It doesn't come under any rule of hearsay because it is not offered for the truth of the statements Mr. Richberg made or the others made at the time.

If this witness acted on it at that time he should
17059 be allowed to tell us what it was he acted on.

Trial Examiner Norwood: He is telling what Mr. Richberg's statement was.

Mr. Leisure: Yes, and he says he acted on it and it is not hearsay because it is not offered for the truth of what Mr. Richberg said; it is offered because Mr. Richberg did certain things which caused him to do certain things and we should have the right to so state.

Mr. Zimmerman: I would like to ask—

Mr. Paulson: The witness may characterize the testimony?

Mr. Leisure: He is not characterizing the testimony.

Mr. Paulson: He is characterizing the testimony.

Mr. Leisure: You say he characterized Mr. Richberg. Mr. Reiter has said what happened.

17060 Trial Examiner Norwood: I think he is interpreting, yes.

Mr. Leisure: His interpretation is what he acted on.

Mr. Paulson: His interpretation is shown, if Your Honor please, by his acts.

Trial Examiner Norwood: I think I shall allow the motion and strike everything in the answer after "urging industry."

Mr. Zimmerman: I haven't known Your Honor, often, to change a ruling because of anything I said.

Trial Examiner Norwood: I would if Counsel would show me a good reason.

Mr. Zimmerman: I think so, and that is the reason I

am persisting. That doesn't mean that Your Honor has not been patient and listened to these things and weighed them all, weighed them very carefully; it means perhaps I have been wrong, but here it seems to me that if the witness had not even correctly or approximately correctly re-stated or characterized the statement by Mr. Richberg it wouldn't make any difference. If he refers to the Richberg statement as he understood it at the time, it gives you the picture of why he did a certain thing as it was done at that time.

It is not an attempt, as I see it, at all, to get into
17061 the record another version of the Richberg statement when the exact thing is already there. There is no fear of that.

Trial Examiner Norwood: Well, I think he may bring out his understanding of the Richberg statement, after the Richberg statement is referred to as being in the record definitely, as an explanation of his actions, and I think it is just as well, but the way it goes in there it is—

Mr. Paulson: Yes, I would not have any objection if that question is put to the witness.

Trial Examiner Norwood: I think it is proper.

Mr. Paulson: What his understanding was, but for him to state what the statement was is a different matter.

Trial Examiner Norwood: Yes. He was not quoting it.

Mr. Paulson: He was not doing justice to Mr. Richberg.

Trial Examiner Norwood: He was interpretitng it.

Mr. Paulson: Mr. Richberg addressed his attention to labor and observance of the code for labor, not to fixing prices.

Mr. Leisure: Your Honor please, I still think he should be allowed to explain why he took the course of action—

Trial Examiner Norwood: Yes.

Mr. Leisure: —and if he is not given an opportunity—

17062 Trial Examiner Norwood: Yes, I think so; go ahead.

Mr. Paulson: We haven't any objection to the Counsel asking him about his understanding of the statement; that is specific.

Mr. Wooden: We do not want to prevent the showing of why.

By Mr. Leisure:

Q. Then, will you explain why this action was taken, if you know?

Trial Examiner Norwood: Yes, go ahead.

A. The action was taken, first, because of the Schechter decision the previous day to the date of this telegram, the statements quoted to the public press by Donald Richberg, who had been until the previous day Administrator of the National Recovery Administration.

Mr. McFadden: Pardon me, Mr. Reiter,—and was for another ten months.

Mr. MacIntyre: If Your Honor please, I do not think we need statements like that to help the witness.

Mr. McFadden: Mr. MacIntyre, I made that statement because of a statement of Mr. Wooden that Mr. Richberg had no official standing—

Trial Examiner Norwood: Well, I think that—

Mr. McFadden: —the N. R. A. was not knocked out by the—

17063 Trial Examiner Norwood: I see.

Mr. McFadden: —Schechter decision, but continued for ten months more.

Trial Examiner Norwood: Yes. Well, let the witness proceed with his answer now.

The Witness: May I hear how far I had gotten with my answer?

Trial Examiner Norwood: Yes.

(Last part of the answer was read.)

Trial Examiner Norwood: All right; finish the answer.

A. (Resumed) Which was to the effect that he urged all industry—

Trial Examiner Norwood: Now, do not give that. Just rule that out.

By Mr. Leisure:

Q. Well, now, then—Mr. Reiter, without telling us that, will you tell us what your understanding was from Mr. Richberg's action which caused the action to be taken which is indicated here by this telegram?

A. My understanding of Mr. Richberg's statement, which appeared in the public press, was that he urged industry to continue to adhere to the principles of codes of fair competition, even after the Schechter decision.

Q. And did the trustees of the Institute hold any
17064 meetings at or about that time, or shortly thereafter?

A. The next meeting of the board of trustees was in June, 1935.

Q. Will you explain the purpose of that meeting, if you know?

A. The stated purpose of that meeting, as stated by the president, was to consider the course open to industry since the Schechter decision, and the course open to The Cement Institute in particular.

Q. Have you now been referring to Commission's Exhibit 623 (handing document to witness)?

A. Commission's Exhibits 623-A, B, and C, are the minutes of the board of trustees' meeting to which I referred, which was held in Chicago on June 10, 1935.

Q. What happened after that? What action, if any, was taken to carry out the wishes of the Administration, if you know?

A. Well, again, members of the industry were urged to maintain wage and hour provisions of the code, and a Trade Practice Committee was appointed, having as members the same persons who were members of the former Code Authority, for the purpose of administering, so far as they could, any voluntary observance of the N. R. A. Code which the members of the industry wished to carry out.

Q. You mentioned Donald Richberg, and others. What others did you have reference to, Mr. Reiter?

17065 A. If I am not mistaken, the president was quoted at that time in the public press as making similar recommendations to those made by Donald Richberg, and General Johnson, the original Administrator of N. R. A., made similar statements and recommendations to industry.

Q. Now, you have mentioned this Trade Practice Committee which was then organized, and you have given the circumstances under which it was organized. What did it do, then, Mr. Reiter, after it was actually set up?

A. Well, it—it acted as a clearing house or it offered to administer the provisions of the late N. R. A. Code, so far as members of the industry cared to observe them, and, specifically, they continued the open price filing of those members—for those members who desired to continue open price filing.

Q. Do you know how long this activity continued—what length of period?

A. Well, the Trade Practice Committee was discharged in December of 1935, and before that time open price filing had practically disappeared in any form.

Q. Will you look at Commission's Exhibit 991 (handing document to witness), and tell us whether or not it has any reference to when price filing was discontinued?

A. Yes, sir; it does.

Q. What is the date, please, if you know?

A. The date of this exhibit is December 12, 1935,
17066 and it is a notice signed by myself, as general manager of The Cement Institute, to all members of The Cement Institute, advising them that filings of prices would no longer be accepted by the Institute.

Q. Will you explain why price filing was discontinued at that time, if you know?

A. Well, it was somewhat automatic, Mr. Leisure. Some members of the industry, and a large number, ceased filing prices at the time of the Schechter decision; others dropped out from time to time, and by the date of this letter there were very few prices offered for filing with the Trade Practice Committee, or The Cement Institute, and the plan was, therefore, ineffective.

Q. Do you know whether or not after this Trade Practice Committee was set up, as you have described, whether there was any enforcement under that Committee of any kind?

A. There was none whatever.

Mr. Leisure: On page 3130 of the record, Mr. Wooden.

By Mr. Leisure:

Q. First, let me take up Commission's Exhibit 991 (handing document to witness).

Will you tell the Examiner whether or not in your experience that first paragraph in Commission's Exhibit 991 is an accurate summary of the open price filing as conducted by the Trade Practice Committee?

17067 Mr. Wooden: Your Honor, I think that question is open to objection, which I now make, on the ground that it can do either one of two things, either affirm this as a correct statement, or try to vary the terms of his own document.

Now, on the first ground, it would be unnecessary; on the second ground, it is incompetent.

17068 Mr. Leisure: If Your Honor pleases, I think he ought to be able to tell us, since it is his document, whether there is anything which he thinks should be added to it.

Trial Examiner Norwood: I think he may explain it.

Mr. Leisure: Whether it is accurate or not.

Trial Examiner Norwood: Yes.

Mr. Leisure: That is all I want him to do.

Trial Examiner Norwood: The objection is overruled.

Mr. Wooden: The question was whether—

Trial Examiner Norwood: Counsel's logic is perfect on that, but I really think—

Mr. Wooden: The question was whether it was correct, was it not, not whether—

Trial Examiner Norwood: I think he may explain. Yes, it was, but I think it is—

The Witness: The statements—

Trial Examiner Norwood: Give the witness an opportunity to explain. It certainly does open up an explanation.

Go ahead.

A. The statement contained in the first paragraph of this letter was entirely correct.

By Mr. Leisure:

Q. On page 3130 of the record, Mr. Wooden re-
17069 referred to the handling of complaints by the Trade Practice Committee after the invalidation of the N. R. A. code.

Will you explain, Mr. Reiter, if you know, how these complaints were handled at the time.

A. Well, an attempt was made by the Trade Practice Committee to handle them in a similar manner, to the manner in which they were handled by the Code Authority, but the attempt was unsuccessful, even so far as the complaints were concerned which were unfinished as of May 27, 1935, and no complaints were handled after that time to conclusion, because of lack of cooperation from members of the industry, and in fact, very few complaints were filed with the Trade Practice Committee,—I think three or four.

Q. On your direct examination you referred to Commission's Exhibit 594, Mr. Reiter, being a letter from your-

self to Mr. Jennings of Wabash, dated August 19, 1935, copies of which were sent to members of the Trade Practice Committee. This letter refers to a complaint on a price quotation deviating from a filed price.

Was this complaint ever handled by the Trade Practice Committee, to your knowledge, Mr. Reiter? I will show you the exhibit (handing document to the witness).

A. So far as I recollect, this letter was never even answered.

17070 Q. Mr. Reiter, I don't recall, before the recess, whether you told us the Trade Practice Committee had a large volume of complaints or a small number of complaints. Did you mention that?

A. Yes, I indicated, at any rate, that they had a very small number of complaints.

Q. Did it have, to your knowledge, any independent investigating of its own, or did it rely entirely on answers to letters addressed to the companies complained about?

A. It relied entirely upon letters to members of the industry complained against.

Q. I would like to call your attention, Mr. Reiter, to Commission's Exhibit 561 (handing document to the witness). It appears that it was submitted to the board of trustees at a meeting of December 9, 1935.

Mr. Leisure: That is Commission's Exhibit 624, Mr. Wooden.

By Mr. Leisure:

Q. What action was taken by the board, Mr. Reiter, if any?

A. I presume that you are referring to the compendium of established terms and marketing methods?

Q. Yes. Just look at Commission's Exhibit 624-E (handing document to the witness).

17071 A. This compendium was submitted to the board of trustees by the Trade Practice Committee at their meeting held in Chicago on December 9, 1935, and the board accepted it as a statement of marketing conditions existing within the industry, and instructed that it be sent as such to all members of the industry.

Q. Was the compendium, as you have described it—was the compendium adopted by the members of The Cement Institute?

A. No, it was not.

Q. Were they asked to sign it, Mr. Reiter?

A. No, they were not.

Q. In your experience, Mr. Reiter, did the Institute take any action with regard to this compendium other than what you have already indicated?

A. No, Mr. Leisure, it did not.

Q. Now, taking up another subject: With regard to the new Trade Practice Committee—I am referring now to Commission's Exhibits 634-N to T which dealt with
17072 the future activities of The Cement Institute. Will you look at the exhibit, please (handing document to the witness)?

First, just explain to the Examiner what it is, please.

A. This is a report of a special committee dated August 19, 1936, this committee being appointed to study the field of action open to the Institute, and to make recommendations to the Board as to such future action.

Q. And what is the date, so the record will be clear on that?

A. The date of the report is August 19, 1936.

Q. And do you recall whether the Trade Practice Committee was referred to in this report? What I have reference to, Mr. Reiter, I want you to tell the Examiner whether it was a trade practice committee referred to in the manner that a trade practice committee was operated, immediately following the N.R.A. Code, which you have already described?

A. This report does refer to a suggested trade practice committee, but it does not refer to one which operated as the committee of The Cement Institute in 1935.

Q. That is what I meant.

Were you a member of this special committee which sent this report to the trustees, as you have described?

A. As general manager I was ex-officio member of all of the committees and in that sense I was a member of this committee.

17073 Q. And was it ever proposed, then, that a new trade practice committee be created?

A. Yes, it was.

Q. And was such a committee ever organized?

A. No, it was not.

Q. And what, if you know, was proposed as to what this new committee should undertake?

Mr. Reiter, let me add to that question and limit it in

this way, by asking you whether it was proposed that this committee would undertake the work described in that exhibit, or whether it was ever assigned to any other committee of the Institute?

A. Well, it was proposed that the trade practice committee suggested herein would conduct the activities suggested in this report for such a committee.

Q. The point I am interested in, Mr. Reiter, is, you told us that no such committee was ever organized. I would like to know if you know whether this work was ever undertaken by anyone else?

A. No, Mr. Leisure, the work proposed in this report to be done by a trade practice committee was not undertaken by a committee of that name or any other committee of the Institute.

Q. Now, on direct examination under another subject heading, Mr. Wooden asked you—

17074 Mr. Leisure: Page 3450, and the following pages, Mr. Wooden.

By Mr. Leisure:

Q. —Mr. Wooden asked you certain questions with reference to lists of basing points and price bases, and I think you said that you had seen such a list.

Will you tell us whether or not the Cement Institute or the Code Authority ever compiled a list of so-called basing prices or the price bases at those points?

17075 A. Neither the Cement Institute, its Trade Practice Committee, nor the Code Authority compiled such lists.

Q. Do you know whether or not the Cement Institute ever distributed a list of basing points, or of price bases, to members of the Institute?

A. Neither did they distribute any such lists.

Q. Were any such lists ever collected by the Cement Institute?

A. No, Mr. Leisure.

Q. Mr. Reiter, taking up another subject matter. Did you have anything to do with the negotiations which resulted in this second or new cement code which you have told us about?

A. You are referring now to the second N.R.A. code?

Q. Yes.

A. Yes, sir, I did have something to do with the ne-

gotiations with N.R.A. officials prior to the approval of that code, and concerning its provisions.

Q. And in those negotiations and preparatory to the preparation of such a code, will you tell the Examiner whether you used or acted upon or relied in any way upon the Respondents' Exhibit, for identification, 171-A to E (handing document to witness).

(Witness examines document.)

A. There is no doubt in my mind that the information contained in this exhibit was kept in mind and undoubtedly influenced my attitude and provisions pro-
17076 posed for the new N.R.A. Code.

Mr. Leisure: I would like to re-offer the document in evidence, if Your Honor pleases. I am referring to Respondents' Exhibits 171-A to E, for identification (handing document to Mr. Wooden).

Mr. Wooden: Your Honor, I wish to object to this Respondents' Exhibits 171-A to E, inclusive, on the ground that it is incompetent, irrelevant, and immaterial. I say, also, that it is incompetent because it brings here the unsworn statements of parties who have no connection with this case; that there is no opportunity to cross-examine the makers of such statements.

It is also irrelevant because we have made no attempt to go into the findings, or the statements of the Darrow Board, to which the document is nothing but a reply, and I would say, further, that if it were received it would then become competent for us to put in the Darrow Board report to which it relates, and I do not wish to do that; but if that document, Respondents' Exhibits 171-A to E, were received that is just what we would be forced to do, and it just gets into a collateral matter, and as a matter of evidence what the Darrow Board thought and what the critics of the Darrow Board thought about the Cement Code, and that has no place in this proceeding. But, I submit, that if that goes in the entire Darrow Board
17077 report would have to go in.

Mr. Leisure: Your Honor pleases, if the Darrow Board report is material or relevant I think it should be in, and Your Honor will recall, I am sure, that when Mr. Wooden offered in evidence the Code it was argued then that it was introduced for the purpose of drawing certain inferences. Now, when we attempt to show the basis of certain of those provisions so that Mr. Wooden's in-

ferences which he seeks to draw will be met, Counsel objects to us showing that.

I submit that that would be showing only one side of the case. The witness has said that he acted upon this. Now, as to the truth or veracity of the statements that is not involved. They may have been ever so misleading, but if this witness acted upon them in the drafting of that code we should be allowed to show it.

Trial Examiner Norwood: Nothing clearer in my mind than that that document is not admissible in this case, so the objection is sustained.

Mr. Leisure: Your Honor Please, Counsel stated sufficient objection covering identification. I would like to ask at the present time if Counsel raises the objection that this document, because it is in mimeographed form, whether he objects to it—whether or not it is as to
17078 the identity that he makes objection, as well other objections.

Mr. Wooden: I didn't mention the matter of identification. I could have made that technical objection, and while, as a matter of fact, I have no reason to doubt that the document is what it purports to be, I nevertheless will add to my objection the fact it has not been properly identified.

Mr. Leisure: There is no question of adding. You have already said it was incompetent, irrelevant, and immaterial which would, of course, raise the technical objection as well as the others.

If that is the ground of Counsel's objection I ask permission to later re-offer this document by calling the Deputy Administrator and having him identify it.

Mr. Wooden: Your Honor—

Trial Examiner Norwood: I don't think I will consider that again. We have had it up a couple times. It is very clear that it shouldn't come in, and if it does come in it will render it necessary to admit considerably more irrelevant material.

Mr. Leisure: If Your Honor pleases, I think it is not necessary to take any exception on that ruling. We have that exception, don't we?

Trial Examiner Norwood: Yes. You can take that up to the Commission, if you wish.

17079 Mr. Leisure: As an offer of proof, I would like to offer these documents, if it meets with your ap-

proval, rather than by reading them out loud, I will ask the Reporter to copy them so that we will save time in that way.

Trial Examiner Norwood: No, I will not let you put that in the record as an offer of proof. That was done yesterday with a small item there, but I didn't understand until after you had gotten well under way what you were doing.

You can make an offer of proof by stating the facts which you intend this to establish but not by quoting from that paper. Tell me what you want to prove by that paper.

Mr. Leisure: The offer of proof which I wanted to make are the provisions here, such as the one that is contained in 170-A under Code Authorities and the paragraphs that are contained—one paragraph on page 2 of 171-C and two paragraphs on 171-D and three paragraphs on 171-E.

Trial Examiner Norwood: What do you want to prove by those?

Mr. Leisure: Taking up 170-A, Mr. Wooden on direct examination stated once, and offered much proof tending
to show or attempting to show that the Code Au-
17080 thority and The Cement Institute were one and
the same thing. Now, Exhibit 170-A shows conclusively that that is not true and was not considered so by the N.R.A. itself. That is the offer of proof I would like to make with respect to 170-A.

As to Respondents' Exhibit 171, which has a mimeographed attachment, 171-A is the letter of transmittal, 171-B, C, and D relate to the subject matters already brought out by Mr. Wooden on this same subject and states what the finding of the N.R.A. was, so it seems to me we should be able to show that in refutation of Mr. Wooden's position on direct examination with this witness, and it is an official document which this witness has said they made use of and sent around to the members of the industry. In other words, they acted on it.

Mr. Wooden: As I understand, this document, which I have not myself seen, it is not an official publication of N.R.A., at any rate, and in addition to that I made no effort to show that the Code Authority and The Cement Institute were one and the same thing by anybody's opinion. I simply brought out certain facts which might be

said to tend to prove that, and I am perfectly willing to have any facts brought out that either tends to prove or disprove, but somebody's opinion that it wasn't so, I don't think we are concerned with.

17081 Trial Examiner Norwood: That was my thought on the subject. Counsel may show these things that he has mentioned here by competent evidence, admissible evidence.

Mr. Leisure: Counsel for the Commission's characterization of a document being offered as mere opinion doesn't allow it to be dismissed so lightly if in truth and fact the document is not one of opinion and the document shows on its face it is a statement of certain facts. It is not a statement of opinion at all. It is the factual statements that I am interested in having in the record.

Trial Examiner Norwood: Yes, but it is hearsay, factual evidence, isn't it?

Mr. Leisure: No. Not when they act on it. It may have been ever so misleading but if they acted upon it, it is not hearsay.

Mr. MacIntyre: If Your Honor please, I would again suggest you take the document 170-A and examine it—

Trial Examiner Norwood: I did.

Mr. MacIntyre: —if Respondents' Counsel insists on having you do so.

It was merely a definition which someone made some time, some place—

Mr. Leisure: You are talking about a different exhibit. We are talking about 171. We finished the discus-

17082 sion as to 170.

Mr. MacIntyre: And as to whether the N.R.A. and The Cement Institute are the same thing I would like to have you look at the document and see where you can find such a definition. It is merely a definition of what is a good trade authority. It refers in no wise to The Cement Institute.

17083 Trial Examiner Norwood: I shall reverse the ruling as to Respondents' Exhibits 170-A and B, on account of the subsequent testimony that was given regarding it, and on account of the fact that the

17084 witness gave some of the contents in evidence, in the absence of objection.

I will receive it as marked.

(RESP. EX. 170-A and 170-B was offered and received in evidence.)

17086 *Redirect Examination.*

By Mr. Wooden:

Q. Mr. Reiter, did the Trade Practice Committee which succeeded to the Code Authority, have anything to do with the matter of wages and hours?

A. There were some matters of labor, and I believe including wages and hours, which were referred to the Trade Practice Committee; I recollect, however, no specific instance.

Q. Do you recollect any action that the Trade Practice Committee took on the subject of wages and hours?

A. Specifically, I do not, Mr. Wooden.

Q. Now, Mr. Leisure called your attention to Commission's Exhibit 594,—I believe asked you whether or not there was a complaint that was handled by the Trade Practice Committee, and I believe your answer was that the Wabash Company did not reply to the letter which comprised that Exhibit 594. Am I correct in that (showing document to the witness)?

A. I believe I said, Mr. Wooden, that to the best of my recollection I did not think they even made a reply
17087 to that letter.

Q. Was that your usual method of handling complaints, to put them in the form of a letter and send them not only to the party complained of, but copies to the members of the Trade Practice Committee?

A. Yes, that is true.

Q. Was that what was done in that case?

A. That was what was done in that case.

Q. With regard to F.T.C. Exhibit 179, which I believe is the Executive Order No. 6636 that Mr. Leisure asked you about, I believe you said that you obeyed the Executive Order although you recognized it as being inconsistent with the open price plan of the code; is that correct?

A. That is substantially what I said.

Q. Did not these Commission's Exhibits 986-A, B, and C (handing documents to witness) involve a handling by the Code Authority of a complaint that the sale was made at less than the filed price on some Government business?

Mr. Leisure: May I have that question read?

Trial Examiner Norwood: Read the question.

(Last question read.)

A: Mr. Wooden, may I have that Executive Order referred to, now, so that I can refer to the date of it?

Mr. Leisure: I have a copy.

Mr. Wooden, are you referring to Respondents' 17088 Exhibit 179, dated March 1, 1934?

Mr. Wooden: I think so.

Mr. Leisure: At the bottom it is dated June 29, 1934. Is that the exhibit you are referring to?

Mr. Wooden: I think so.

Mr. Leisure: I have a copy of it here, Mr. Wooden, if you haven't got the original.

(Mr. Leisure hands document to Mr. Wooden who hands same to the witness.)

A. Now, Commission's Exhibit 986-A does not show, so far as I can see, whether or not this was a bid to the United States Government, so that I cannot answer as to that exhibit.

986-B does show that the bid complained against was a bid to the United States Engineer's Office, and if as a defense of this matter the member complained against had raised the question of this Executive Order, that would have ended the matter, so far as we were concerned.

By Mr. Wooden:

Q. Did anyone raise the question of this Executive Order having any bearing on this complaint?

A. On this complaint?

Q. Yes, represented by 986-B and 986-C.

A. The matter was not raised, so far as this correspondence disclosed.

Q. Did the Code Authority handle that com-17089 plaint of a sale being made at less than the filed price on Government business without considering the question of whether or not the Executive Order was applicable?

A. They evidently did, in this case, and I am not sure but what they did in all cases.

I remember some instances, and, if I am not mistaken, it was one of the Bonneville, Oregon, bid, was a defense of a complaint was held to be this Executive Order 6646, and the Code Authority recognized that as valid defense of a violation of the Code.

Q. You recognized it whether or not it was specifically brought in to the situation; is that what you mean?

A. Yes. There was another provision of that Executive Order which may not have been in the order itself, but was subsequent information, and that said that a company bidding less than the price filed with the Code Authority and within 15 percent would not be in violation of the Code if the bid was made to the United States Government, provided that they filed their intent immediately and where that was done the Code Authority recognized that as a valid defense of a complaint.

Trial Examiner Norwood: What authority did you have for that?

(Mr. Leisure hands a document to the Examiner.)

The Witness: I am not sure whether it was in the
17090 order itself, or whether it was in subsequent information from the N.R.A.

By Mr. Wooden:

Q. Well, referring to F.T.C. Exhibit 179, the modification of the Executive Order 6646, don't you understand that to provide that the bidder might quote a price as much as 15 percent below his filed price?

A. Yes, I so understand.

Q. Yes.

A. I understand so.

Q. Now, Mr. Leisure asked you whether or not the Institute ever distributed any lists of basing-point prices. Did the Code Authority ever distribute any such lists?

A. No, Mr. Wooden.

Q. Did any individual company, so far as you know, distribute any such lists?

A. So far as I know, they did not.

Q. I do not mean, necessarily, during the Code Authority period, or the code period, but at any time since 1929 have you known of any lists of basing-point prices being distributed by any companies or company representatives?

A. No, sir; I know of none.

Q. I believe on direct examination that you said that you had a Lehigh list for reference. How did that come into your possession?

17091 A. I got that from Mr. Rader of the Lehigh Company. Mr. Rader's office and my own office were on the same floor in the same building, although at opposite sides of the floor, and I was in daily contact with him, and

he gave me a copy of their own compilation of list of basing points.

Q. Is that while you were an official of The Cement Institute?

A. Yes, sir.

Q. What use did you make of it?

A. None whatever. I was interested in it as a personal matter, as I was interested in all matters in the cement business.

Q. Did you ever see any of the lists of basing-point prices compiled by the Penn-Dixie Company?

A. No, sir.

Q. Or any lists compiled by the Universal-Atlas Company?

A. Well, of course, I have now seen lists of basing-point prices compiled by the Universal-Atlas Cement Company.

Q. Did you ever see them before you became connected with the company?

A. So far as I recollect, I have not.

Q. Referring to this plan for sharing available business, proposed by the Code, was there any such plan ever put into effect for any particular section as distinguished from a national plan, or anything of that kind?

17092 A. So far as I know, there was not.

Q. You know of no such plan ever having been put into effect in, say, Districts 1 or 2 of the Institute?

A. No, sir.

Q. Or for any short length of time, as distinguished from a long length of time?

A. No, sir; I did not.

Q. Mr. Reiter, Mr. Leisure asked you a question as to whether or not—referring to Commission's Exhibits 630-A, B, C—whether an interpretation that I had made about the decision of the Code Authority in that matter having been predicated upon a theory of diversion—your answer did not go to that specific point, I believe, you gave your explanation or description of just what was involved in the case.

Is there anything in the exhibit which shows the Code Authority had in mind the theory of diversion as a basis for its decision of that matter?

17093 A. The Code Authority in this instance has indicated three items of the Code which they thought

would possibly be violated by sale as requested by
17094 this contractor if the sale was made by a member of the industry, and one of those three ways or one of those three points is Article X, section 3, of the Code, which has relation, apparently, referring only to these minutes, to diversion.

By Mr. Wooden:

Q. On page 16931 you testified on cross-examination, Mr. Reiter, that there were a few cases where Government destination costs were supplied. I take it that means where they were supplied to the Institute, but in view of your other testimony not transmitted on by the Institute to the member; is that correct?

A. That is right.

Q. What were those few cases where the Government destination costs were supplied?

A. The ones that I have right now are cases where the Universal-Atlas Cement Company filed land-grant rates and included in their letter of filing their own computation of Government destination costs.

Q. Were there any other companies that you can name that filed Government destination costs?

A. Specifically, Mr. Wooden, I can remember none.

Q. Is it your best recollection that Universal-Atlas was the only one?

A. I just don't know. It is my best recollection at this time that they were the only one who did so.

17095 Q. On page 16936 you testified that the dealer differential was not in effect in 1930. Just what did you mean by that, Mr. Reiter?

A. Well, if I used those words I don't blame you for not understanding it. What I meant to say was that at one time cement companies quoted prices to their customers from which a dealer discount was allowed in addition to the cash discount, and it is my recollection that such dealer discount was not in effect in 1930.

Q. Are you referring in your answer, Mr. Reiter, to the Lehigh Company putting in a plan for a time during 1930 which removed all dealers' differentials and provided only for a five-cent refund at the end of the year, five-cent per barrel refund at the end of the year?

A. I did answer a question or two regarding the so-called Lehigh plan to which you refer. I don't know at

this time whether you have correctly and fully described that Lehigh plan.

17096 Q. No, I haven't fully described it. Prior to the adoption of the so-called Lehigh plan in 1930 was there a usual differential that the dealers had between the cost of the cement to them and what they sold it for?

A. For a time, and I cannot tell you what time that was, except that it was prior to 1930, the manufacturers of cement did sell in certain areas at least at a price from which a dealer's discount was allowed in addition to the cash discount.

Q. And how much was that?

A. The figure that I recall is 10 cents a barrel.

Trial Examiner Norwood: That was given to the consumer when there was no dealer involved, was it?

The Witness: No, sir. As a matter of fact, that would be the price at which the cement company offered to sell to a consumer.

By Mr. Wooden:

Q. That is without the 10 cents off, you mean?

A. That is right.

Q. In other words, so that the dealer would then be protected to the extent of 10 cents?

A. Yes, but Mr. Wooden, there are some classes of customers to whom they sold direct, whom they did also offer this so-called dealer discount to.

Q. Didn't that particular thing result in consid-
17097 erable confusion and in fact wasn't it one element in the Lehigh plan of 1930?

Mr. Leisure: I object to Counsel's leading question as to confusion and unless he defines what he means and in whose minds the confusion arose, I don't think it is a proper question.

Trial Examiner Norwood: Objection overruled.

A. Mr. Wooden, I cannot fully answer that question because I was not sufficiently familiar with the details of the Lehigh plan nor what led up to it.

By Mr. Wooden:

Q. Mr. Leisure asked you if The Cement Institute ever, as far as you knew, sent out any unsigned communications or received any unsigned communications. Did you know of any such practice of sending and receiving unsigned communications among companies in the industry?

A. I knew of no such practice or instance.

Q. On page 16966, and again on page 16969, you said that you did not attempt to set the prices to be filed with the Code Authority.

With reference to instances where you called the attention of companies filing certain delivered prices, that their prices were less than those filed by others at the same destinations, were you attempting to influence the price to be filed at those points?

17098 A. Not at all, Mr. Wooden. I have testified on direct and also on cross-examination that by the process that it was necessary for our office to go through in filing this mass of prices at the beginning of the code, with the aid of unskilled help, we felt sure that some errors had occurred, and we checked ourselves by advising members of the industry of differences in price at destination through my knowledge that it was unusual if not impossible for cement to be sold at a higher price than a competitor's price on a standard material.

Q. I am referring to occasions where you called attention to the fact that the filing company had filed lower prices than the other companies.

A. Well, our practice in that regard, so long as it was a practice, was to advise those companies if there were more than one that were in the minority whether they were high or low among those who had filed for any certain destination.

Q. Did you count on the desires that they might have to get as much as anybody else, in calling it to their attention?

17099 A. I don't believe that I considered that at all, Mr. Wooden.

By Mr. Wooden:

Q. All right.

I believe you said, Mr. Reiter, that the Code Authority did not attempt to restrict price filing to either destination or mill prices just so the prices were definite.

A. That is right what I said; yes, sir.

Q. I believe you also said that there were some 25 mills that filed f.o.b. mill prices. Will you name what mills you can that did so file?

17100 Trial Examiner Norwood: You may have the map.

Mr. Wooden: You may have that map all right.

The Witness: If you prefer, I will do it without the map.

Mr. Zimmerman: Commission's Exhibit what?

Trial Examiner Norwood: Commission's Exhibit 1.

Mr. Zimmerman: We have one in the printed book that might do.

Mr. Wooden: I prefer having him name them from memory; that is all.

A. First will be all plants in the State of Washington, of which there are five; five companies owning six plants.

By Mr. Wooden:

Q. Were those filed for some particular bidding project or were they filed for all purposes?

A. In some cases they were filed for a particular project as the Grand Coulee Dam where they all filed, and in other cases they were filed f.o.b. trucks at mills, and—

Q. Still speaking of Washington?

A. Beg pardon?

Q. Still speaking of Washington?

A. Still speaking of Washington. And in one case they were filed f.o.b. dock at mill and that mill point being Seattle. Shall I go on?

Q. What I am interested in is a general filing of
17101 the f.o.b. mill prices to be applicable in all cases without regard to destination.

Mr. Leisure: Well, that is another question.

17102 A. And there are three mills in the State of Oregon, belonging to two companies, and prices have been on file during the code period for each of those three mills, to the best of my knowledge.

All California mills have had prices filed with the Code Authority f.o.b. mill points.

Certain of the Colorado mills, and at this point I will have to refer to a map.

(Whereupon, the witness referred to a document.)

A. (Continuing) Boettcher, Colo., Concrete, Colo., Devil's Slide, Utah, Hanover and Trident, Montana.

Mr. Zimmerman: Pardon my interruption, are you naming destinations or mills?

The Witness: I am naming mill points at which prices were filed f.o.b. mill, with the name of the mill.

Mr. Zimmerman: Thank you.

The Witness: It is the name of the mill point.

Mr. Zimmerman: Yes, but I thought we ought
17103 to have the name of the mill, too.

The Witness: Oh.

Mr. Zimmerman: The name of the company.

A. The Ideal Company and its subsidiaries, mills at Boettcher, Colo., Concrete, Colo., Devil's Slide, Utah, Hanover, and Trident, Montana, and Portland, Colo. The Southwestern Company mill at El Paso, Texas. The Lone Star Mill at New Orleans. This map is not much help to me because I have to refer from the mill point to the schedule below.

The Marquette Cement Company at Cape Girardeau, Mo.

By Mr. Wooden:

Q. Mr. Reiter, let me interrupt there a moment. Are you including in your list of mills that filed a price f.o.b. mill to be included in a Government destination of cost with the control clause out?

A. No, sir; I haven't yet.

Q. You haven't yet?

A. That would add to my estimate of the number of mill prices filed.

Q. Are these that you have named so far cases where they have filed f.o.b. mill prices regardless of destination?

A. So far as I recollect at this time, there are only two mill points at which prices were filed f.o.b. mill without restrictions of any kind.

Q. And what were they?

17104 A. There were many of these points which I have named or which were included in my estimate of more than 25 mill points which were not restricted in any way other than that they were filed as prices f.o.b. truck or f.o.b. barge.

Q. Not for rail delivery?

A. Some of them were so restricted so as not to include rail delivery. The only two that I recollect without any restriction of any kind on them were the two mill points of the Three Forks Portland Cement Company at Hanover and Trident, Montana. There may have been others, but those were the only two I remember now.

Q. And that was without restriction?

A. That was without restriction, yes.

Q. How about the Huron Company? Was that also filed without restriction f.o.b. mill?

A. My recollection is that the Huron Company filed at their plant at Duluth f.o.b. trucks without restriction, and, by the way, I did not include packing plants in my estimate. That would further add to my estimate.

The Huron Company, and others, according to my best recollection, filed prices during the code period f.o.b. truck at their packing plant at Milwaukee, as did others.

The Universal Company filed f.o.b. truck at their plant at Buffington, Indiana.

Do you want me to go ahead with all of these?

17105 Q. Yes.

Mr. McFadden: Yes.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: You mean Universal-Atlas, do you?

The Witness: Universal-Atlas Company; yes, sir.

A. (Continuing) At various times there were prices on file at the plants or some of the plants in and around Birmingham, and in those cases it is my recollection that they were restricted for sale to the United States Government.

By Mr. Wooden:

Q. For a particular destination?

A. Some were and some were not.

Q. Is it your testimony, Mr. Reiter, that the only filing f.o.b. mill without restrictions was in the case of Trident and Hanover, Montana, plant?

Mr. Zimmerman: Just a minute. Before another question is asked I think we ought to know whether the witness has finished his recitation of all the several mills. I don't think he should be interrupted until he has finished.

Trial Examiner Norwood: The objection is overruled. Let him answer the question. We will get back to that.

The Witness: Your Honor, I wonder if there would be any objection for my using a map with which I am more familiar known as the cement map of the United
17106 States? Has anyone a copy of that here, published by Muirhead?

Trial Examiner Norwood: Answer this question and then you may proceed to give the other mills.

The Witness: May I have the question, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. I said, Mr. Wooden, and that is still my statement, that those were the only ones that I remembered at this time. There might have been others but those are the only ones I remembered, now.

Trial Examiner Norwood: Go ahead. Complete your list of mills, in answer to the previous question.

A. I now recollect that there was a price f.o.b. mill of the South Dakota State cement plant on file. There were prices on file f.o.b. the Dewey plant at Linwood, Iowa.

By Mr. Wooden:

Q. That was restricted in some way? Do you remember in what way that was?

A. There were several filings f.o.b. that mill, and the only ones that I remember were restricted to f.o.b. barge. A price was filed f.o.b. mill of the Kosmos Portland Cement Company at Kosmosdale, Ky.

17107 Q. Was that f.o.b. barge, you say?

A. I didn't say, but I believe it was restricted to f.o.b. barge.

And it is my recollection that all mills within the State of Michigan, including packing plants, had during the code period or at some time during that period, a price on file f.o.b. their mill and packing plants.

There was a price filed f.o.b. one mill and one packing plant at Toledo, Ohio. Prices filed f.o.b. packing plants and warehouses, Cleveland, Ohio.

Mr. Smith: That would be the Huron, wouldn't it?

The Witness: That would be one of the points at Cleveland.

Mr. Smith: And at Toledo?

The Witness: And at Toledo. My point is that there are other companies having packing plants, mills or warehouses at each of those destinations.

Mr. Smith: Exactly.

Mr. Wooden: If anyone wants anything further—I don't want to take any more time, as far as I am concerned, on that.

Mr. Leisure: It is all right.

Mr. Zimmerman: If he is finished, it is all right. If there are any more I would like to have them unless the question is withdrawn entirely.

17108 Trial Examiner Norwood: Is that all you recall?

Mr. Zimmerman: Don't you forget that you had a

hypothetical question in this record in which you assumed that the Respondents refused to quote and sell f. o. b. mill, and now I think it is pertinent to show to what extent they did.

Trial Examiner Norwood: Go ahead. Finish your answer.

The Witness: Well, I am not entirely sure that I have covered all mill points at which any price was filed f. o. b. mill, but that is all I recollect.

Trial Examiner Norwood: On these mills you have designated, there, did they invariably file f. o. b. mill prices?

The Witness: No, sir; they also filed in all cases destination prices. I mean—at each of these companies owning the mill points also filed destination prices.

Trial Examiner Norwood: Well, you spoke of restrictions there. The specification for delivery at barge, was that the only restriction you spoke of or was the restriction at certain destinations?

The Witness: And restrictions were of various kinds, one was such and such a price f. o. b. mill and f. o. b. barge.

Trial Examiner Norwood: Yes.

17109 The Witness: Another one would be f. o. b. trucks. Another one would be f. o. b. mill for sale to the United States Government. Another one would be f. o. b. mill applying to specific letting of the United States Government, and, as I say, some were unrestricted by any such things.

Trial Examiner Norwood: Some were restricted for use at Government destinations?

The Witness: No, except that those which were applied, which were restricted to apply to a specific letting of the United States Government would apply to whatever destination was—

Trial Examiner Norwood: Yes.

The Witness: —in that particular Government proposal.

17110 Q. Were any of these mill prices with restrictions attached that were filed the equivalent of the basing-point prices of any mill?

A. Yes, sir.

Q. To what extent was that the case?

A. Well, Mr. Wooden, it was frequently the case. I don't know what percent of the cases that would cover.

Q. Do you now recall of any non-basing-point mill filing a mill price without restriction or even with restriction?

Mr. Zimmerman: May I have that question?

(Last question read.)

A. Mr. Wooden, it will be difficult for me to answer that question because I am not familiar with basing points in the West, or what—I should say what points are basing points, at least in the western part of the country.

By Mr. Wooden:

Q. Well, in the territory that you are familiar with, what would be the answer?

A. I do not now think of any case where that is true.

Q. You said in reply to a question of Mr. Leisure that there were a number of cases where manufacturers did not change their prices when different filings were called to their attention. How do you know that their prices were not changed even though their filings were not changed?

A. Well, Mr. Leisure—I may not know, as you
17111 suggest, but based on my experience, I would say that in the code period if they were selling at a price not on file with the Code Authority, we would be very apt to hear about it from their competitors, who would charge a violation of the code.

Q. But, in any event, you couldn't really know what the price was as distinguished from the filing unless you made an effort to check it up?

A. No, sir. All that I had knowledge of was—were the prices on file with the code authorities.

Q. Now, with regard to this five-day waiting period under the code, was that a pretty well established practice before the N.R.A. Code, to have five days' notice of impending price changes?

A. I really don't know. May I add to my answer?

Q. Yes.

A. During that time I was with the Missouri Portland Cement Company, or a part of that time, which was from January 1, 1931, until August 1, 1933, it was not the practice of that company to give five days' notice to customers of a price change.

Q. Well, during that same period was it the custom of other companies to give such notice?

Mr. Leisure: The question has been answered. The witness said he didn't know.

Trial Examiner Norwood: Let him answer it again.

Mr. Wooden: He should have known enough about
17112 what his competitors were doing in the field.

A. I can answer price changes in some cases. We found in the field that it was the practice of some companies to quote an increase in price dated five days prior to the effective date of that price increase. I mean, Mr. Wooden, if I may add by saying that I didn't know that—that I don't know and did not at that time know the extent to which that was the practice in the industry.

By Mr. Wooden:

Q. Since the code period have you known of any cases where price changes were initiated without five-day notice?

A. Yes. Of course, all declines are so initiated.

Q. How about advances?

A. At the present time I think of no price increase which reached my attention where a—or, rather, whether the details reached my attention where the customers were not given at least five-days' notice, where the price change was an increase.

Q. Have you known of any case where they were given more than five days' notice?

A. I am pretty sure that I have but I cannot remember an instance right now, Mr. Wooden.

Q. Was the Missouri Portland Cement Company during the period you were with them, was it a basing-point mill, have a basing-point mill?

17113 A. Yes, sir.

Q. You testified on page 17026 and 7 that you knew of no conferences between manufacturers and dealers after the code concerning the subject of what was proper dealer trade, and so forth. Did you have in mind your meetings with Mr. MacQueen and Mr. Carnahan in the summer of 1935 when you made that answer?

A. Yes, and if I am not mistaken I made an answer which covers that. In other words, there were meetings between the Code Authority from the cement industry and the Code Authority for all building-supply industries or the dealers.

Q. You did not mean to testify, then, to anything except as to meetings between the respective code authorities representing the dealers and manufacturers, you mean open public hearings in Washington?

A. Oh, no, not at all. We had other meetings, as I think I described in my answer to questions, upon the instructions of the Deputy Administrator to try and work out a

new Article XI and it is upon that subject that I understand your question to apply, Mr. Wooden.

Q. Well, I shall direct your attention to meetings between yourself and Mr. MacQueen and Mr. Carnahan in the summer of 1935 after the code or after the Schechter decision. Did you class those as conferences between manufacturers and dealers?

A. No, I didn't. The conferences were sometimes
17114 merely meetings between one or the other of those persons and myself, and in one case that I now think of was a joint meeting which was with Captain Collins of the Procurement Division.

Q. Well, in your answers yesterday, then, did you mean to exclude conferences between representatives of dealers and manufacturers?

A. No, sir; I did not mean to exclude anything, and, as I say, I, as an officer of The Cement Institute, and in one case, namely, the meeting before the—in the offices of Captain Collins, a manufacturer was present when representatives of dealers were present for a specific discussion.

Q. Do you know anything about any conferences in Chicago along in March and April, 1935, attended by representatives of cement manufacturers and dealers?

A. No, Mr. Wooden, I do not.

17115 Q. Do you know of any code authority meetings held in March and April of 1935 in Chicago to which representatives of dealers and manufacturers discussed that subject of what classes of trade were proper for the dealer and for the manufacturer?

A. I don't recollect any, Mr. Wooden.

Q. Would you say that if there had been any such code authority meetings you would have known about them?

A. I would say that if there were such code authority meetings they have escaped my recollection and the minutes of the code authority would show, and I imagine all of the minutes are in evidence.

Q. You were chairman of the code authority at that time?

A. When, Mr. Wooden?

Q. March and April, 1935?

A. Yes.

Q. All I am merely asking you is if there were code authority meetings, you, as chairman of the code authority, would have known of such meetings?

A. That is true, of course.

Mr. Leisure: The witness has answered that before.

By Mr. Wooden:

17116 Q. On page 17029, Mr. Leisure was asking you about transportation agencies giving rebates and gave an illustration of a $2 price where the transportation agency paid the buyer 20 cents rebate, and I believe you said that that would have violated the filed price. Would it also have violated the filed price if the $2 delivered price were based on rail freight and the buyer made delivery by truck and got his cement delivered at 20 cents less than he could get it delivered by rail?

Mr. Leisure: Just a minute. There is confusion in the question because it indicates that the prices were filed on something, of course, as has been testified to. They were simply prices filed. I think there is an incorrect assumption in the question.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled. Answer the question.

A. It would have been a violation of the code, if I understand your question, unless the member of the industry had a price f.o.b. his mill for delivery to truck. Your question, assuming, as I understand it, that the buyer actually makes delivery by truck from the seller's mill?

By Mr. Wooden:

17117 Q. Yes. You testified that the code of ethics of the Institute that existed prior to the N.R.A. code that violations of it were not policed by the Chicago Division while you were there. Do you know whether or not such violations were policed by any other division of the Institute at that time?

A. Mr. Wooden, I have a hazy recollection that about the time or immediately after the time I left The Cement Institute on January 1 that there were some forms printed upon which members could report apparent violations of the code of ethics, and so far as I know, and I believe I do know, that activity was never carried out.

Q. Are you undertaking to speak for the whole Institute or just for the Chicago Division?

A. Well, I am sure of that fact for the Chicago Insti-

tute and I am reasonably sure for other offices of the Institute.

Mr. Wooden: I would like to call upon Counsel for the Respondent to produce the forms which Mr. Reiter referred to as being printed for use in connection with investigations of the code of ethics during 1930 and 1931, and for the files showing the handling of a complaint on November 24, 1930, by the Giant Portland Cement Company against the Edison Portland Cement Company with reference to prepaid freight and the files covering the complaint of the Edison Portland Cement Company against Penn-Dixie Cement Company in November,
17118 1930, in regard to prepayment of freight.

Mr. Leisure: We will make a search for the others, but as to the forms Mr. Milwee, one of the Commission's representatives, took the forms from our files, so we don't have those.

He took photostats of these other documents which Mr. Wooden has described, but we will make a search for them.

17119 Q. Mr. Reiter, with regard to the violations of the code of ethics that preceded the N.R.A. code, were cases of alleged violation discussed at meetings where the members were present?

A. At no meeting where I was present, Mr. Wooden. The first I knew of that was when you quoted me something which was apparently minutes of meetings of The Cement Institute. I didn't know of any such case.

Q. You never attended any meeting at which violations of the code preceding the N.R.A. code were discussed?

A. To the best of my knowledge I have not.

Q. You spoke of the statistics on cloth sack returns which you said, not the statistics, but that the return of cloth sacks, handling of cloth sacks was a method by which secret rebates could be given or discrimination indulged in?

A. Yes.

Q. Wherein did the statistics used for cloth sacks returned give any information that would have enabled you to ascertain whether secret rebates were being given or discrimination indulged in?

A. Well, if a company correctly reported their cloth sack statistics, and I assume that they did, the element of secrecy at any rate was eliminated.

Q. Well, you didn't know of any particular case or particular sale where rebates were being given from those statistics, did you?

17120 A. Not as to any particular sale because these reports were made on a monthly basis and included all cloth sack returns within that month.

Trial Examiner Norwood: Would that give the amount of the allowance for each company?

The Witness: It showed the number of cloth sacks returned to a mill and the number for which full credit was given to the customers in totals.

Trial Examiner Norwood: The amount of the credit?

The Witness: Yes, sir. The amount of the credit was 10 cents a cloth sack.

By Mr. Wooden:

Q. How did you know—

Did you have a report as to the amount allowed for all the sacks returned also?

A. No, sir.

Q. How could you tell from the statistics then whether any secret rebate had been given in the form of sack returns?

A. Merely on the statement of the company reporting so many sacks were returned and so many were credited to the company, to the various customers.

Q. At 10 cents. Was that statement made that they were credited at 10 cents?

A. I don't think that statement was made in the report, but that was the custom at that time.

17121 Q. How did you know whether they were not allowing 12 or 15 cents instead of 10 cents?

A. Well, without having the report before me, I don't believe we did have any knowledge of that other than the terms which were published by the various cement companies, and even those did not reach the attention of the Cement Institute.

Q. Then the statistical reports did not enable you to ascertain whether any rebates were given in any particular case?

A. It didn't enable us,—the Cement Institute to know that although it may have been indicative to other members of the industry to whom those reports were sent.

Q. I want to ask you to explain wherein the statistics

of cloth sack returns would have enabled any other member or any member of the industry to ascertain whether there was a secret rebate given in the form of sack returns?

A. I must speculate now, Mr. Wooden, because I was not at that time in the position—

Q. Yes.

A. —of a cement company employee, but if I were in that position and had received these statistics, I would measure the cloth sack returns as reported with my own percentage of allowances on cloth sacks returned to me, and that would have indicated to me whether or not my own company was too rigid or whether, in my opin-
17122 ion, other companies were too lax in their allowances.

Q. So long as you didn't know the amounts credited on the sacks, you still would not know whether any secret rebates had been given, is that right?

A. A presumption would have to be made that credits were made in accordance with the sales policies of the companies.

Q. In other words, the assumption would have to be made that there were no secret rebates?

A. Oh, no; I don't follow that.

Q. I mean in the form of excessive credit for sacks?

A. No, Mr. Wooden, I cannot follow that.

Trial Examiner Norwood: How could you check this, just by knowing the number of sacks returned?

The Witness: Well, if one company reported that they allowed credit for 100 per cent of the sacks returned to them, that was evident that they had made too great an allowance because the experience on cloth sack returns in the industry was materially less than that on usuable sacks returned to the same company.

17123 Q. You spoke of the employment of Mr. Mallory as statistician. I would like to get the date of his first employment by the Institute as statistician.

A. His first employment was in 1933, and some time after the middle of that year, Mr. Wooden, and I believe it was on January 1, 1934.

Q. And he continued in that employed capacity ever since, as long as you were connected with the Institute?

A. Yes, and he still continues in that capacity.

Q. Well, he acted as a statistician on cement industry matters prior to his employment in 1933, did he not?

A. He had an enterprise of his own, a statistical service, which was subscribed to by some members of the cement industry, and I don't know how many subscribed to that service.

Q. Subscribed for by some members of The Cement Institute, did you say?

Mr. Leisure: He said members of the industry. His answer is perfectly clear.

By Mr. Wooden:

Q. Do you mean to say that the members of the industry that subscribed to the Mallory service prior to his employment in 1933 by the Institute were or were not members of the Institute, is my question?

A. Well, I don't know who subscribed to his private service, Mr. Wooden, and, therefore, I can only guess
17124 whether they were, later on, or at the time, members of The Cement Institute.

Q. Did the Institute, itself, have available contemporaneously the Mallory statistics, prior to 1933?

A. No, sir.

Q. You never saw them prior to 1933 when he was employed as statistician?

A. I never saw them; no, sir.

Let me be sure I have answered you question. The Cement Institute, as I have testified, collected these same statistics in 1930 and until April 1, 1931, and thereafter they never again collected them until Mr. Mallory was employed, and I don't know what the situation was between April 1, 1931, and January 1, 1934.

Q. Well, during 1930 and 1931 were both Mr. Mallory and the Institute compiling the same kind of statistics?

A. I don't know, Mr. Wooden. I never saw any of his reports at that time.

Q. I believe you said that the Code Authority did not call for the statistics on stock and production during the N. R. A. Code; is that right?

A. That is right.

Q. Who did call for them during the N. R. A. Code?

A. The Cement Institute through its statistical bureau.

Q. That was Mr. Mallory?

17125 A. That was Mr. Mallory.

Q. This credit service that Mr. Leisure asked you about; when was that discontinued?

A. It was discontinued before the end of 1930 in the Chicago office and I believe it was during September of October of that year.

Q. Why was it discontinued?

A. Because members of The Cement Institute felt that the National Association of Credit Men who furnished a similar service should be supported by their membership.

Q. Wherein was the freight rate service of this National Traffic Bureau unsatisfactory that preceded the Institute's own compilation of freight rates?

A. Well, I know, Mr. Wooden, but I hesitate to say because it discloses personal criticism toward the head of that National Traffic Bureau.

Q. All I want is what condition of the freight rates, themselves, that you secured through it, what about the service that you got that was unsatisfactory, without any regard as to what caused the unsatisfactory character?

A. The service was not kept up to date and was not accurate, and thus was considered to be, by the members of the industry and of the Institute who were subscribing to that service, to be unsatisfactory.

Q. While that service was being employed did 17126 the members of the Institute use it in the same way that they have used the freight rate books compiled since, through the Bethlehem Bureau and Chicago Division Bureau?

A. That would only be a speculation on my part. I don't know.

Q. Did you use it while you were with the Missouri Portland Cement Company?

A. No, sir.

Q. Can you say whether or not there was criticism of the use of the National Traffic Bureau rate service because of the uncertainty and confusion in delivered prices that resulted from it?

A. I can't say, Mr. Wooden.

Q. What non-member subscribers to the freight rate book service of the Institute can you name?

A. I can name the South Dakota State Cement Plant and I can give you a description of others although I cannot specifically mention their names, in this manner, which may be satisfactory. That after a number of resignations which, as I have testified, occurred in the fall of 1930 and

early in 1931, some of those members who resigned subscribe for freight rate service and paid a fee for that service.

Q. Can you name the non-member subscribers since the N. R. A. Code?

A. The only one I think of now is the South Da-
17127 kota State Cement Plant.

Q. How about the Louisville Cement Plant, prior to their resignation?

A. Up until the time that I left the Cement Institute the Louisville Company was being supplied with that service for the reason that they contributed to funds from which it was being operated prior to their resignation from The Cement Institute and what has happened since that time I do not know except that at a meeting of the board of trustees early in 1937, but after I left The Cement Institute a resolution was passed providing for a charge for that service to all non-members except State highway departments and Government bodies.

Q. I believe you said that the experience of the Universal-Atlas Company had been that when it compiled its own freight rate books it was put to no less expense than when it subscribed to the Institute's freight rate books; is that right?

A. No, sir; that is not what I intended by my answer. My answer was intended to say that the cost of preparing these books in the Universal-Atlas' traffic department would, from my knowledge, be no less than the cost of preparing the same books in the office of The Cement Institute.

Q. That is not a comparison, then, of actual figures, but an opinion based on your general experience; is that right?

A. Yes, and bearing in mind that I have had ex-
17128 perience on both sides of that situation.

Q. And do you mean to say that it cost the Universal-Atlas Company a greater amount to put out its own books than to use the Institute books?

Mr. Leisure: What does that question mean? There are two questions, the use of the Institute books or greater amount.

Trial Examiner Norwood: It is clear. Read the question.

(Question read.)

Trial Examiner Norwood: Than to use the Institute books.

Mr. Leisure: One question says does it cost them more to put out the Universal-Atlas books, and the last part of the question than to pay for the Institute's books?

Trial Examiner Norwood: No, that question is perfectly clear. If he doesn't understand it, we will read it again.

Mr. Wooden: Read the question.

The Witness: Please?

Trial Examiner Norwood: Do you understand the question?

The Witness: I would like to have it read again, if Your Honor please.

17129 Trial Examiner Norwood: Read it.

(Question read.)

A. And to?

By Mr. Wooden:

Q. Than to.

Trial Examiner Norwood: Not "and," "than."

A. Well, I don't know whether I said so on previous examination, but I will now say so, that it does cost them more to put out their own books than the cost of that service which they pay to The Cement Institute for The Cement Institute books.

Trial Examiner Norwood: Well, that is, they could make a saving by using the Institute's books?

The Witness: Yes, sir.

By Mr. Wooden:

Q. How much?

A. In dollars and cents I do not know, but I can analyze so that I can—

Q. What percentage?

A. I cannot tell you in percentage.

Q. Universal-Atlas, in putting out its own books, would probably have to put out a larger amount of books than almost any other company, wouldn't it, considering the number of their mills and location and territory and number of salesmen, wouldn't it?

17130 A. I believe so far as I know that the Universal-Atlas Company has more salesmen than any other cement company and if books were furnished to salesmen, that being true, it would be necessary for them to have a greater number of books.

Q. And are they furnished to Universal-Atlas salesmen?

A. Yes, sir.

Q. So far as the traffic needs of Universal-Atlas Company are concerned, would that expense of handling traffic be increased by a lack of the Institute rate book?

A. May I have that question read?

Trial Examiner Norwood: Read it.

(Question read.)

A. I will have to ask you what you mean, Mr. Wooden. I don't—I sense a distinction there, but I don't understand it.

Trial Examiner Norwood: Would the traffic expense be more if they didn't use the Institute books?

The Witness: The answer is "Yes."

Mr. Zimmerman: Better explain what is meant by the traffic expense.

Trial Examiner Norwood: Did he answer my question?

The Witness: Yes, sir; I answered that yes.

By Mr. Wooden:

Q. Will you state just where it would be?

A. In answering His Honor's question, I had in
17131 mind the total expense of our traffic department and the work of preparing these books, if it still continues, then our traffic department would materially add to that expense.

Q. Oh, of course it would, but, for purposes of calculating the freight and the amount, the shipping freight and the actual freight from your various mills on particular shipments made from those mills wherein would the cost of your traffic department be increased if they didn't have these Institute freight rate books?

17132 A. I am sorry, I don't know to what extent our shipping department, if that is what you mean, uses these freight rate books in making their shipments.

Q. Do you know that they use them at all for the purpose of calculating actual freight?

A. I do not know what their practice is.

Q. And you don't know whether the expense would be increased or decreased in that department by the lack of these Institute books for the purpose that they now carry on their activity?

A. If you are talking about the shipping department?

Q. Yes.

A. I do not know.

Q. Why is it necessary, Mr. Reiter, to have as headline points in the Institute freight rate books points other than the shipping point of a particular mill?

A. Well, for the complete information of the person or the company using that book, so that they can measure the cost of delivery from any probable shipping point as against their own cost of delivery.

Q. In other words, in order that they may meet the destination price of other mills shipping from other points?

A. Well, I didn't have that in mind when answering your question.

Q. What did you mean by your answer?

A. I mean—

17133 Mr. Leisure: He meant just what he said. I think the answer is perfectly clear. May we have it read?

Trial Examiner Norwood: If he doesn't think it is clear, he may ask another question.

Mr. Wooden: Will you read the answer.

(Thereupon the answer was read as follows:

"A. Well, for the complete information of the person or the company using that book, so that they can measure the cost of delivery from any probable shipping point as against their own cost of delivery.")

The Witness: May I have the next question?

(The next question and answer were read as recorded.)

A. In many cases a company or an employee of any company having that information can judge the extent of its competition, the cost of transportation from some competitor's mill to certain destinations within the area covered by the book, and might in the opinion of the person investigating that matter prevent them from being highly competitive on that job or at that destination.

By Mr. Wooden:

Q. He would have to know more than the freight, however, wouldn't he, to know what the delivered price was likely to be of his competitors?

A. Well, he would have to know his own destina-

17134 tion price, at least.

Q. That is right.

A. Or the going destination price at that particular destination.

Q. Wouldn't he have to know what base price was applicable at that destination?

Mr. Leisure: He would have to know it for what? The question isn't clear.

Trial Examiner Norwood: I think this witness understands it.

Mr. Leisure: I object to the question as stated, Your Honor. I think it is an ambiguous question.

Trial Examiner Norwood: Objection overruled.

A. Well, specifically, Mr. Wooden, he would not. He would have to know, as I say, what the destination price is or what he, the person analyzing this thing, proposed to quote at destination in order to analyze, together with the freight rate, what his competitors, to what extent they would be highly competitive on that job.

By Mr. Wooden:

Q. If he knew the destination price he wouldn't need the freight rate book at all, would he?

A. Oh, yes, he would.

Q. Isn't that all he would need to do; just quote the destination price, whatever it may be, without using
17135 the freight rate book?

A. Well, if he cares to do that.

Q. You spoke, Mr. Reiter, on cross-examination, of a compilation of freight rates put out by the Nazareth Traffic Bureau. I am showing you Exhibit 2849, for identification. Do you recognize that as the sort of compilation put out by that Bureau that you were referring to?

A. Mr. Wooden, I believe you will find that the extent of my testimony is that I knew of or had heard of a Nazareth Traffic Bureau and so far as I know I have never seen one of their books in which they reported freight rates.

Q. Did you say that their compilation or publication was put out for the benefit of the smaller companies?

A. I said that the small companies in the Lehigh Valley subscribed to that Bureau or supported that Bureau; some such remark as that.

Q. As distinguished from the big companies in the Lehigh Valley?

A. Yes, sir. That is my understanding.

17136 Q. Referring to the conversion tables that were used at times along with the freight rate book. Why did you drop the conversion tables from the books?

A. Well, I did that, Mr. Wooden, on my own initiative.

It was my opinion that the conversion table then appearing in the freight rate books issued by the Cement Institute was unnecessarily long and complicated and I knew that some cement companies, at least, had conversion tables of their own which they used, and which were much simpler than the conversion table in the Cement Institute books, and, therefore, I saw no use in continuing it and discontinued it.

Q. Was it just because you thought companies were sufficiently familiar with it to get along without it; that it served no useful purpose?

17137 A. Well, I thought the subscribers to the Cement Institute who were receiving this service looked upon this conversion table heretofore in the books as I did, that they would prefer that it be left out of the books because it was possible to compile a very short and simple conversion table which would serve all purposes.

By Mr. Wooden:

Q. So far as figuring freight, actual freight was concerned, didn't the freight rate books, weren't they sufficient without any conversion table into barrels? Wasn't the per hundredweight sufficient for purposes of figuring actual freight on any carload shipment?

A. Oh, yes. Multiplied by 3.8 to get it into cents per barrel.

Q. Why was it important to get it into barrels,

17138 except for the purpose of calculating delivered prices?

A. Well, if the freight was being investigated for any purpose or being used for any purpose, it would be necessary to get it into barrels because the industry habitually, as you know, deals in barrels.

Q. But so far as dealings with the railroad was concerned, all the railroad was interested in was how many hundred pounds or how many—how much hundred pounds?

A. Yes; but quotations per barrel, nevertheless.

Q. And it was in order to make quotations per barrel it was transferred from cents per hundredweight to cents per barrel, isn't that right?

A. That would be one reason. I don't know whether there are others or not.

17139 Q. This control committee: What was the membership of this control committee that you referred to in your testimony?

A. You mean who were the members of it?
Q. Yes.
A. Mr. B. H. Rader, Mr. Robert Henderson—
Q. Will you state who he was?
A. Mr. Henderson was president of the Pacific Portland Cement Company and I believe that the other member was Mr. L. T. Sunderland.
Q. Only three members?
A. That is my recollection.
Q. This committee, as I understood it, had to do with the framing of the N.R.A. Code?
A. Well, they had charge of it, Mr. Wooden, of framing drafts which were submitted to N.R.A.
Q. Did most of the work on that committee fall to Mr. Rader?
A. No, sir.
Q. The chairman?
A. I don't recall, Mr. Wooden.
Q. Who did you say he was?
A. I don't recollect who was chairman.
Q. Regarding this expense of various kinds that Mr. Leisure asked you about concerning the hearings on the Wheeling anti-basing-point bill, was any payment
17140 made to Professors Clark or Burns for services in preparing any statement submitted to that Committee?
A. They were not paid nor did they prepare any statements for submission before that committee.

By Mr. Wooden:

Q. Was any work done by either of them in connection with any statements submitted before that committee?
A. No, sir.
Q. Did you testify on cross-examination that the
17141 Institute was selected to draft the code, N.R.A. code?
A. Yes, sir, to that effect, at any rate.
Q. Who made that selection?
A. The members of the industry.
Q. What caused so many resignations from the Institute between April, 1931, and its revival in 1933?
A. I believe, Mr. Wooden, that the resignations, many of them were prior to April 1, 1931, but I can answer, nevertheless.

Q. Go on.

A. The business, the cement business was going into the recession at that time very rapidly, and in my opinion members of the industry were trying to save all costs that they could and felt that they could do away with, and the cost of The Institute was merely one of those costs which they thought they could save.

Q. Did it ever come to your attention at that time that some members resigned because of price cutting in the industry?

A. I don't recall that it did. In explanation of that last answer, extending that last answer, I would like to call your attention to the fact that I left the Institute on January 1, 1931, so that those resignations which would reach my attention specifically would be prior to January 1, 1931, and there were some of them before that time.

Q. Did the Missouri Portland Cement Company resign?

17142 A. No, sir.

Q. You testified, I believe, that the stock and production statistics were useful in seeing whether additional sales efforts were necessary.

A. Yes, sir; I did testify to that.

Q. Well, would you consider additional sales efforts necessary if you were holding your own proportion of the business compared to what it had been?

A. Well, it would depend, Mr. Wooden, on what the proportion had been.

Q. Well, will you explain your answer then as to what you mean by determining whether additional sales efforts were necessary?

A. Well, if I were satisfied that sales by my company in one year were reasonable, and the total business in that area increased in the next year 10 percent and my sales increased 12 percent, I would not put forth any additional sales effort in that particular territory.

Q. You mean you would not care to increase it 15 percent?

A. I say if I were satisfied that—to specifically answer your question, I would be glad to increase it to 15 percent.

Q. But if you had increased 8 percent whereas the industry as a whole had increased 10, then you would think increased sales efforts were necessary?

A. Yes, bearing in mind, as I have said, if when
17143 I started to figure these changes I thought our sales were satisfactory in that particular territory.

Q. And you based that in part upon whether you were holding your own proportion by comparison with what had been the situation in the industry?

Mr. Leisure: I think the witness has already answered that question very clearly twice, Your Honor. This is merely argument now.

Trial Examiner Norwood: I think he may answer that.

A. Well, of course, the only thing that I would have to compare my own sales progress against would be the total sales of all companies in any particular area.

By Mr. Wooden:

Q. Well, don't you consider that a company is interested in increasing its own sales in excess of the increase that the industry gets?

A. Certainly I am.

Q. I believe you testified that these duplicated or padded contracts that you referred to were defeated upon price provisions of the code; is that right?

A. No, sir; I don't think that is exactly right.

Q. What is right?

A. I meant to say, at any rate, that padded,
17144 imaginary, and duplicated contracts, which provided free cement not required by the work described in these contracts would tend to defeat the open price plan during the code days unless—that is if this cement were in the market and if the price had been raised beyond the price existing in those contracts.

Trial Examiner Norwood: What do you mean by "free" cement?

The Witness: I mean—

Trial Examiner Norwood: Cement not required by that job?

The Witness: Yes, by all of these jobs. Mr. Wooden is talking in totals now.

Trial Examiner Norwood: By the jobs specified in the contracts?

The Witness: In the various contracts; yes, sir.

By Mr. Wooden:

Q. This contract checking, I understand, was discontinued in October, 1936?

A. Yes, sir.

Q. Why was it discontinued?

A. It was discontinued on order of the board of trustees because they were cutting down all services of the—or reducing all services of The Cement Institute as an effort of economy.

Q. And discontinued for no other reason that
17145 that of economy?

A. I don't think of any other reason for which it was discontinued.

Q. Since The Cement Institute moved its offices back to Chicago has it occupied the space of the Lehigh Company in the Conway Building there?

A. I don't believe it has. I have only been in those offices once since they moved back to Chicago, and it occupied space separate from the Lehigh Company but on the same floor with the Lehigh Company and certainly the Lehigh Company would not be foolish enough to give them space without rental.

Q. I didn't ask you anything about that, but whether they had occupied the space of the Lehigh.

A. So far as I know, they haven't, Mr. Wooden.

Mr. Wooden: Just a minute. I think I am through. I think that is all, Mr. Reiter.

*Recross Examination.*

Mr. Smith: Just one question.

Trial Examiner Norwood: Go ahead. We don't go to anything on this redirect but strictly redirect, as far as I know. Any questioning will have to be just merely incidental.

By Mr. Smith:

Q. You were asked whether or not any mills other than those that Mr. Wooden described as basing-point
17146 mills ever filed prices with or without restrictions f.o.b. mill, and you answered that you didn't recall any. You had already said that all of the mills in Michigan had at one time filed such prices.

A. Yes.

Q. Were you desirous of correcting your later answer?

A. Well, yes, there are several mills, at least in Michigan, which I am sure are not so-called basing-point mills.

Q. That is Petoskey?
A. Petoskey isn't.
Q. Belleview, was that operating then?
A. No, sir; I don't think it was operating then.
Q. Was Wolverine?
A. That is not a basing-point mill.
Q. And Cement City?
A. No Cement City. Wolverine has two cement mills.
Q. There was one at Cold Water and one at Quincy?
A. Coldwater and Quincy.
Q. Then there is one at Port Huron, Aetna?
A. Yes, sir; and that is not a basing mill.
Q. And then there was a Fenton mill of the Aetna, that was not a basing point?
A. No.
Q. So you do now recall at least those mills that would not come within Mr. Wooden's description as bas-
17147 ing-point mills which did file f.o.b. prices?
A. Yes, sir; that is in accordance with my knowledge.

Trial Examiner Norwood: Filings under the code, are you referring to?

The Witness: Yes.

By Mr. Zimmerman:

Mr. Zimmerman: As I said, I had one question on that f.o.b. matter which I wanted to ask and Mr. Wooden said he would prefer I wait.

Trial Examiner Norwood: Go ahead.

Q. That was with reference to restrictions that you referred to on f.o.b. mill filings. Were those in conformity with the invitations where the invitation would ask for a price, for example, f.o.b. barge, or f.o.b. truck, or whatever it did ask for, or not?

A. Some of those invitations, but not all of them, reached my attention, and where the filings were for specific lettings, they were, of course, conditions which were satisfied by the invitations.

Mr. Zimmerman: Thank you. That was all I wanted.

Mr. Conaghan: Your Honor, I would like to ask a few questions directed solely to new matter brought out on redirect examination.

Trial Examiner Norwood: Go ahead.

By Mr. Conaghan:

17148 Q. Mr. Reiter, this afternoon Mr. Wooden asked you a number of questions relating to lists of "basing-point prices," so-called, and you stated that such lists were not distributed among members of the industry either by the code authority or by the Institute during the years that you were associated with those two organizations, and then you stated that you had seen such lists during the last two years, approximately, since you have been with the Universal-Atlas Cement Company.

From what sources is the data obtained for the compilation of those lists of "basing-point prices," so-called?

Mr. Conaghan: I ask that the Reporter kindly put within quotation marks "basing-point prices."

A. The so-called price base point lists of the Universal-Atlas Cement Company are compiled from quotations found in the field by the company's own representatives, sufficient quotations being found in any case to make it evident that some maximum mill price is being used by that competitive company who owns that mill.

Trial Examiner Norwood: You figure that back by deducting the freight?

The Witness: Yes, sir.

By Mr. Conaghan:

Q. And then after those various quotations from various manufacturers are collected at various destinations, then what is done with them to compile the lists?

17149 A. The freight rate is subtracted from the destination prices so found and if they work back to a uniform or the same price f.o.b. that mill, in its favorable price location, the assumption is made that that is a so-called base for that competitive mill.

Q. And who in the organization of the company with which you are now associated does that work?

A. Well, a number of us can do it. Usually the sales manager in the territory where the prices are picked up and a complete price file in the case of a price which is kept in my office in New York.

Q. Is it necessary to obtain mill price figures direct from other manufacturers to compile such a list?

A. It is neither necessary nor is it done.

Q. Has the Universal-Atlas ever distributed such lists

of so-called "basing-point prices," generally, throughout the industry, to other manufacturers?

A. Not so far as I know, or believe. Certainly it has not been done since I have been with the company.

Trial Examiner Norwood: Is it distributed to its customers?

The Witness: No, sir; they don't distribute a list of basing-point prices to their customers.

Trial Examiner Norwood: Distributed to their salesmen?

17150 The Witness: Information on basing points in and near the territory covered by the salesmen is given to them. I am not sure whether it is given to them in that form about which Mr. Conaghan and I are talking, or not, Your Honor.

By Mr. Conaghan:

Q. Then this data regarding the so-called "basing-point price" put out in the form of a list is merely a tabulation, is it not?

A. That is correct.

Q. And that the so-called "basing-point price" is just a mere tabulation and not a price at all; is that correct?

A. According to my own definition it is in no sense a price unless the offer is made to sell at that location and at that figure.

Mr. Conaghan: Yes. That is all.

*Redirect Examination by Mr. Wooden.*

Q. In that latter case, Mr. Reiter, in the terri-
17151 tory governed by a particular mill base price or base price, would not the sales be made at that net which would be the equivalent of the base price?

A. No, sir, Mr. Wooden. Under my reasoning they would not be so made.

Q. And even at the location of the mill, sales made right at the location of the mill, would they be made at the base price at the mill?

A. If a price is offered to customers at that figure at the mill then the sale would be made at that price; not otherwise.

Q. You don't sell to mills, to customers, there, without knowing where it is to be delivered?

A. We do sell at a quoted price at some of our mills such as Duluth and Buffington.

Q. Allow the customer to take it wherever he pleases?

A. At both places the price is restricted to f.o.b. trucks, and to certain customers; that is, dealers.

Q. And is your f.o.b. truck price based upon the delivered price at particular destinations; the regular delivered price?

A. No, sir.

Q. Do you know where it is going before it is made for truck delivery?

A. We have a rough idea because we sell it to dealers, and we know what territory a dealer normally operates in.

Q. Have you ever had competitors inquire of
17152 you over the telephone or otherwise what your base prices were?

A. The answer is "no," Mr. Wooden.

17156 Washington, D. C.,
March 7, 1939.

17161 Mr. Wooden: The first thing I wish to bring up
17162 is with regard to Commission's Exhibit, for identification, 1950. We were to have a witness regarding it this morning but that witness has been excused from appearing under the present subpoena.

Mr. Conaghan, representing Universal-Atlas, however, I understand, has a certain statement to make regarding that particular exhibit.

Mr. Conaghan: —Commission's Exhibit 1950, for identification, I wish to state that on behalf of Universal-Atlas Cement Company we waive the identification of this exhibit.

We do state, however, that the contents are irrelevant and incompetent and immaterial to the issues of this case.

This particular exhibit was prepared by Miss
17163 Carlson, who is a file clerk in the offices of the Universal-Atlas Cement Company, and at the time of the preparation of this particular document she was employed at its Chicago office.

It was prepared by her at the request of Mr. Greenley, who is now deceased. Mr. Greenley, at the time, was employed at the Chicago office of the Universal Atlas Cement

Company in the capacity as assistant to the vice-president and general sales manager, Mr. F. L. Stone.

The pencil figures on this exhibit, Commission's Exhibit 1950, for identification, have been written by Miss Carlson.

Mr. Wooden: It doesn't show they are pencil on that particular paper (referring to Commission's Exhibit 1950, which is a photostat).

Mr. Conaghan: The initials in the lower left hand corner are the initials of Miss Carlson. The date, February 4, 1936, is the date when it was prepared.

This was the only copy made by Miss Carlson. She is not a typist, and, therefore, did not make any typewritten copies of this document nor were any other copies made. It was found in the files of Universal-Atlas Cement Company when the assistant attorney general of the State of Texas, Mr. Bouldin, was going through the files of the company at Chicago during the spring of 1938. No use
17164 was made of this particular document by the company. It was not circulated in any way and was not distributed to any other manufacturers.

Mr. Wooden: I would like to ask Mr. Conaghan if he knows whose handwriting this entire tabulation is.

Mr. Conaghan: In the handwriting of Miss Carlson.

Mr. Wooden: The entire document is her handwriting?

17165 Mr. Conaghan: Yes.

Mr. Wooden: Not merely the initials?

Mr. Conaghan: No, I am so informed that the entire document is in the handwriting of Miss Carlson.

(Mr. Wooden hands document to the Trial Examiner.)

Trial Examiner Norwood: Do you offer this now, or do you want to wait?

Mr. Wooden: Yes, Your Honor, I will change my mind and offer it at the present time (having reference to paper marked for identification Commission's Exhibit 1950).

Trial Examiner Norwood: Well, I think that is—

Mr. Leisure: If Your Honor pleases—

Trial Examiner Norwood: Yes.

Mr. Leisure: —in addition to the objections already stated, without raising any objection whatever to the identification of the document, we object very strenuously to it being received in evidence on the ground that it is incompetent, irrelevant, and immaterial; does not prove or

tend to prove a single issue in this case; there is no allegation in the complaint having to do with the subject of distribution of business in any way.

This document does not even remotely relate to any issues raised in the complaint; the statement under
17166 which it is being received in lieu of the witness shows that it was never used in any way; was never distributed.

It is therefore, as far as we can see, utterly immaterial.

17167 Mr. Wooden: Your Honor, on the point of whether such a document is relevant under the issues of the complaint, it falls into the category of a number of activities which were not specifically charged in the complaint; but, as to which one of the complaint's allegations charged the use of other methods tending toward the same result.

Trial Examiner Norwood: Yes.

Mr. Wooden: And promoting of the same objectives as the ones specifically charged.

Now, on the question of distribution of business, of course the relevancy of that, or even a proposed distribution of business,—the relevancy of that as showing objectives and purpose, and psychology, so to speak of Respondent, is perfectly relevant and material.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibit, subject to its being connected up with these activities by the whole record.

17168 (COM. EX. 1950 was offered and received in evidence.)

Mr. Wooden: Now, at this time, Your Honor, I should like to offer in evidence papers previously marked for identification as Commission's Exhibits 2459, 2460, 2461, 2462, 2463, and 2464.

These papers are typewritten copies of documents which were in the files of the Lone Star Company of Texas, as I understand it, and were identified by a stipulation
17169 of the Lone Star Company in the so-called Texas suit.

These particular documents and papers bearing these numbers were in the hands of Respondents' Counsel for some time for the purpose of checking to ascertain whether they might be received without further identification.

It is my understanding that that check has been made

and no objections were implied to them on the ground of insufficient identification. In other words, it is my understanding that Counsel for the Respondents are willing to agree that the documents are what they purport to be.

Mr. Leisure: No, that goes beyond—that is beyond identification of the documents.

Trial Examiner Norwood: Yes.

Mr. Leisure: And I want to make clear that the stipulation, so-called, goes no further than it did in the Texas case.

Trial Examiner Norwood: Yes.

Mr. Leisure: Namely, that we raised no objection to the identification of these documents. They are whatever they are, and we are not stipulating anything beyond that. That is, we raise no objection to identification.

We do, however, object to the documents as being incompetent, irrelevant, and immaterial, and not
17170 bearing upon the issues in the case.

Trial Examiner Norwood: Any further objections?

Will you hand me those papers, please?

Mr. Wooden: Do I understand—

Trial Examiner Norwood: I want to look at those papers.

Mr. Wooden: Do I understand, Mr. Leisure, that you are willing to make the same stipulation regarding the identification of these papers that was made in the Texas case?

Mr. Leisure: Mr. Wooden, I think my statement is perfectly clear. What you are trying to get me to do is to stipulate, for instance, in the preceding exhibit it says "Fair distribution of Colorado River project." Now, it is my contention that that is not evidence of the distribution of business, but, rather some—

Mr. Wooden: I am not talking about that exhibit at all.

Mr. Leisure: I know, but I want to explain to the Examiner how it applies to this exhibit.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: It is my contention that that exhibit does not prove or tend to prove a distribution of business. A man might sit down in his office and make a memorandum and say, "Now, if we get so much this man might
17171 get so much," and go ahead and figure out on a sheet of paper what he though he should get if other manufacturers got certain amounts.

Trial Examiner Norwood: Yes.

Mr. Leisure: In my opinion that would not prove or tend to prove distribution of business.

Now, under the stipulation that Mr. Wooden is asking me to enter into now, if there are any such writings on any of these exhibits I would then stipulate that they did prove what he says they purport to show.

Now, I have never agreed—

Mr. Wooden (Interposing): I did not—

Mr. Leisure: —to stipulate any such thing, and I do not intend to. All I intended to do was to save him the trouble of calling witnesses to identify these documents as being—they are whatever they are—

Trial Examiner Norwood: Yes.

Mr. Leisure: —and I am not going beyond that.

17172 Trial Examiner Norwood: And as coming from where they purport to come from.

Mr. Leisure: That is it, exactly, and I am not stipulating beyond that; in fact, I am not stipulating at all. I am simply waiving identification and that is as far as I am willing to go.

Mr. Wooden: I had no thought of suggesting Mr. Leisure agree that any of these documents show any particular thing at all, but merely that the documents as physical documents are what they purport to be as documents.

Trial Examiner Norwood: Are those the documents that are offered?

Mr. Leisure: No. You see, they raise the question again.

On this previous exhibit Mr. Wooden says it purports to be a fair distribution of business.

Mr. Wooden: I am not talking about that at all.

Mr. Leisure: This is an example of our problem.

Trial Examiner Norwood: I think the Counsel's statement is clear. He is merely waiving identification and as the identification is waived, I shall receive them and overrule the other objection, and receive them: Commission's Exhibits 2459, 2460, 2461, 2462, 2463, and 2464.

17173 (Com. EXS. 2459, 2460, 2461, 2462, 2463, and 2464, were offered and received in evidence.)

Mr. Zimmerman: As I understand, those are received subject to the objection that they do not tend to prove the inferences which Mr. Wooden has suggested. Certainly there is—

Mr. Wooden: I have suggested no inference.

Mr. Zimmerman: —an inference that may be drawn just as Mr. Leisure has stated it, and there is no reason why that should be extended beyond that.

Personally, I think the documents are objectionable because they do not have any connection whatsoever with many of the respondents. They should be confined, so far as their admissibility in evidence is concerned, to the particular respondent from whose file they were obtained and they should not be extended beyond that and that applies to this exhibit which is number what?

Mr. Withrow: 1950.

Mr. Zimmerman: 1950, as well.

Trial Examiner Norwood: We have a clear understanding about that.

Mr. Wooden: I had supposed a waiver of identification was tantamount to an agreement that the document
17174 was what it showed on its face to be.

Mr. Leisure: Then you ought to be satisfied with the waiving of identification, Mr. Wooden. I am not willing to go beyond the waiving of identification, Mr. Wooden. I am not willing to go beyond waiving identification. I am not stipulating to anything.

Mr. Zimmerman: And, as I understand, that waiver is made on behalf of the Respondent from whose files they came, and not otherwise. It is not binding upon anybody else, outside of that.

Mr. Wooden: That is a conclusion of law, you are seeking to draw, there.

Mr. Zimmerman: It is a statement of the position taken by the Respondent that I represent. That is what I mean by it.

Mr. Wooden: I would like to know, Your Honor, whether this waiver of identification means that these papers which purport to be copies of letters were copies of letters that were actually written by the parties purporting to have written them and are actually received in the—

Trial Examiner Norwood: I understand that that has been waived by this Respondent here and in case of other letters in the files of other Respondents, they are not considered as against all the Respondents until the con-
17175 nection appears from the entire record. Whether they agree to it, or not, that is the law.

Go ahead.

Mr. Wooden: I would like to inquire whether Mr. Leisure is willing to agree that those documents are copies of documents that were writen by the parties whose names appear on them as having written them to these people to whom they were addressed?

Mr. Leisure: I don't know why we spend all this time on it, Your Honor. I think Your Honor understands thoroughly what waiver of identification means.

As I understand waiver of identification, it means that if the party who wrote the letter were placed on the stand he would acknowledge it as having been the letter that he wrote, but not anything beyond that which Mr. Wooden has mentioned in these other documents that it does show certain things. It shows whatever it does show.

Trial Examiner Norwood: I think that is clear.

Mr. Leisure: I don't see why we need to spend time on that.

17176 Mr. MacIntyre: Well, if Mr. Leisure simply would have stated a few moments ago that he was doing so and waiving identification, it would have been possible for the man who had been placed on the stand who wrote them in stating that he had written them to the persons to whom they purport to have been written, such as he has just done, that would have saved the argument.

Mr. Leisure: I have already done that.

Trial Examiner Norwood: He did that.

Mr. Leisure: I stated that a half an hour ago.

Mr. MacIntyre: That is perfectly clear now.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: I should also like to offer at this time some other papers which are copies, photographic copies of documents from the files of the Lone Star Company of Texas, which were numbered 2417, 2418, 2420, 2421, 2422, 2423-A and B, 2426, 2427-A to E, 2428-A and B, 2429, 2430, 2431, 2432, and 2433. I believe all those papers whose numbers I have just given were submitted to the Respondents' Counsel in Kansas City and it was indicated at that time, as I understand it, that identification might be waived as to them.

Mr. Leisure: If Your Honor please, as to the larger group of documents which I will refer to by number later, we can save some time by waiving identification in-

17177 stead of calling witnesses as to those, but as to Commission's Exhibits 2421 and 2418, for identification, I do not feel that we should be called upon to take any position with respect to identification, 2421 being from what purports to be the president of a lumber men's association in Texas addressed to all memers, which would indicate this letter which the president sent was to his own members. Counsel for the Commission is in as good a position to identify that document as we are, and I do not feel that we should be called upon to go out and try to identify it.

As to 2418, that is also from a non-respondent in this case. We have no control over it. I don't think that we should be called upon to waive identification. That, of course, has nothing to do with our objection as to competency or materiality.

Trial Examiner Norwood: Yes.

Mr. Leisure: Or relevancy.

Mr. Wooden referred to the other exhibits as having come from the Lone Star files. I note that Commission's Exhibit 2423 shows on its face it came from the Trinity files. With that correction, we have no objection to waiving identification, that it is from the Trinity files.

As to Exhibits 2432, 2423-A, B, 2426, 2427-A to E, 17178 inclusive, 2417, 2420, 2422, 2429, 2430, 2431, we will not put the Commission to the trouble of calling witnesses merely to identify the documents. We waive the identification.

As to 2428-A, B, that being already in evidence, there is no necessity for offering it again.

Mr. Wooden: I don't want to do that.

These are the two as to which identification has not been waived?

Mr. Leisure: That is right.

Trial Examiner Norwood: As I understand it, now, identification is waived as to all of the exhibits—

Mr. Leisure: Except—

Trial Examiner Norwood: —under discussion except Commission's Exhibits 2418 and 2421.

Mr. Leisure: Yes, Your Honor.

Trial Examiner Norwood: Those are received in evidence and I will examine—

Mr. Leisure: If Your Honor please, Mr. Wooden had

not yet offered them, and I hadn't stated any objection until he does offer them in evidence.

Trial Examiner Norwood: I understood they were offered.

Mr. Leisure: He has not offered them. When he offers them I would like to state an objection for the
17179 record.

Mr. MacIntyre: Off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wooden: As to Commission's Exhibit 2421, for identification, all I can ask of Mr. Leisure is that he agree that it is a copy of a document that was found in the files, I believe, of the Lone Star Company in Texas.

Mr. Leisure: I am willing to do that subject to check, Mr. Wooden.

Mr. Wooden: Yes. And as to Commission's Exhibit 2418, for identification, unless the San Antonio Portland Cement Company was a member of The Cement Institute on July 20, 1935, I wouldn't care to offer it. Subject to a check on that point, however, I think it might well be offered.

As to Commission's Exhibit 2421, for identification, is that agreeable, Mr. Leisure, that it is a copy of a document that was in the files of the Lone Star Cement Company of Texas?

Mr. Leisure: Subject to check, Mr. Wooden. I really don't know. If it isn't found to be so, I will want to so state on the record.

Mr. Wooden: And subject to check as to Commis-
17180 sioner's Exhibit 2418, as to the membership of the San Antonio Company in the Institute?

Mr. Leisure: That is, if it was in the files, but I am not saying, in my opinion, that the mere finding of the paper in the files is any proper ground for offering the document in evidence. Don't misunderstand me.

Mr. Wooden: And, further, as to Commission's Exhibit 2418, will you agree that that is a copy of the document found in the Lone Star Company's files, of Texas?

Mr. Leisure: I won't agree, but if on check I find it was found in those files I will not raise any objection to that.

Mr. Wooden: Then, Your Honor, I wish to offer at this time the following exhibits: Commission's Exhibits 2417, 2418, 2420, 2422, 2423-A and B, 2426, 2427-A to E, inclusive, 2429, 2430, 2431, 2432, and 2433, for identification.

Trial Examiner Norwood: Is there any objection?

Mr. Leisure: Yes, Your Honor. We object to all of these exhibits as being incompetent, irrelevant, and immaterial, and particularly to the two exhibits which are from non-respondents, Commission's Exhibits 2418 and 2421, for identification.

Mr. Wooden: I understand—

17181 Mr. Leisure: They, of course, are not binding in any way upon the Respondents in this case.

Mr. Wooden: Off the record?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Then the identification of 2418 on its presence in the Lone Star files; its competency, however, rests upon other grounds; namely, we have shown Respondents to be engaged in the same or similar activity to what is represented by the San Antonio Company on the face of that document, and that it is admissible as showing one of the effects of Respondents' acts and program upon the industry.

Mr. Leisure: You cannot, of course, Your Honor, use the document itself as proving its own competency, and I cannot believe that we have reached the point in this case where a document found in the files of the Respondent is sufficient to hold that document material and relevant regardless of who may have written it or what the contents may be.

Trial Examiner Norwood: Any further objections to these exhibits?

Mr. Wooden: Some inference may be drawn from the fact that it was found in the files of another company.

17182 I disagree with the statement of Mr. Leisure that the competency of a document is not determinable from the examination of the document.

Mr. Zimmerman: Only relevancy.

(COM. EXS. 2417, 2418, 2420, 2422, 2423-A, 2423-B, 2426, 2427-A, 2427-B, 2427-C, 2427-D, 2427-E, 2429, 2430, 2431, 2432, and 2433 were offered and received in evidence.)

Mr. Leisure: When the Reporter is ready, I would

like to state I assume, Your Honor, that all of these exhibits are received subject to the usual understanding that they must be connected up in some way before they will be considered in this case.

Trial Examiner Norwood: They are not received subject to any special understanding. I think our understanding of the law is that they must be connected
17183 up with these activities, connected up with the whole, and that certainly is the logic of the case also.

Mr. Leisure: I merely wanted my objection to appear on the record on behalf of the others who are not involved in this transaction.

17187 (COM. EXS. 2850-A, 2850-B, 2850-C, 2850-D, 2851-A, 2851-B, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863-A, 2863-B, 2864, 2865-A, and 2865-B, were offered and received in evidence.)

Mr. Wooden: The Reporter has marked for identification papers which I have in my hands, running from Commission's Exhibits 2866 to 2877.

These papers are photostatic copies of documents also from the files of the Penn-Dixie Cement Company—that is at its Des Moines, Iowa, mill or office. They were obtained in 1931 by Mr. Royal of the Commission's staff, but they had not come to my attention at the time that Mr. Royal was on the stand in Chicago to identify other documents.

I am submitting them to Counsel for the Respondents with the suggestion that identification as to these particular documents be waived, and that if Mr. Royal were recalled to the stand he would testify to having obtained those documents from the Des Moines office of the
17188 Penn-Dixie Cement Company, and that for the purposes of this proceeding he may be taken as having so testified.

Mr. Leisure: If Your Honor pleases, I would like the opportunity, before these are offered, to check them over the lunch hour with Penn-Dixie Counsel, and I will call Mr. West over the lunch hour and I think we will be able to save the Commission calling individual witnesses as far as identification is concerned.

Trial Examiner Norwood: All right.

Mr. Wooden: Will you mark this for identification?

(The document referred to, consisting of 20 pages, which are extracts of testimony from cement industry repre-

sentatives in hearing before the Committee on Interstate Commerce, United States Senate, 74th Congress, Second Session, on S-4055, March and April, 1936, was marked for identification as Commission's Exhibits 2878-A to 2878-T, both inclusive.)

Mr. Wooden: The Reporter has given the number 2878, for identification, to a bound collection of typewritten sheets, 20 all told, and the first sheet of which reads as follows:

"Extracts from testimony of cement industry representatives in hearing before the Committee on Interstate Commerce, United States Senate, 74th Congress
17189 Second Session, on S-4055, March and April, 1936."

These typewritten extracts are taken from the printed transcript of the hearings before the Committee referred to, and they are offered as the sworn statements of representatives of various Respondents. They can be readily checked against the official transcript, if desired, or against the printed transcript, which is in general circulation, and of which I can provide a copy if wanted.

I offer the papers in evidence upon that showing (handing document to Mr. Leisure).

Mr. Wooden: I would suggest that the Reporter number these various pages A and B, and so forth, because the binding is not very permanent, so to speak.

Mr. Leisure: Do you want to mark it before we look at them?

Mr. Wooden: Yes. There are 20 pages, altogether, counting the facing sheet.

Trial Examiner Norwood: It is Commission's Exhibits 2878-A to T, for identification.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. Wooden: I should state that the typewritten pages bear the numbers of the pages on which the extracts
17190 appear in the printed transcript.

Trial Examiner Norwood: This is for the record?

Mr. Wooden: Yes.

Mr. Leisure: If Your Honor pleases, without taking time to read through this now, there are some 20 pages here of testimony. If I can look at this over night I can check it and state whether or not we have any objection in the morning.

Mr. Zimmerman: What is the number?

Mr. Leisure: 2878-A.

Mr. Wooden: You have the volume.

Trial Examiner Norwood: Yes, A to T.

Mr. Leisure: Of course, I would like to check, Mr. Wooden, not only with the volume but with the witnesses to see whether they stated correctly their answers. If they haven't I would like to bring that out in some way, if they have any corrections to be made.

Mr. Wooden: Of course, I was seeking to avoid the necessity of going back to the official original transcript, or calling in the Reporter, or anything of that sort. I assumed there would be no objection to taking the printed transcript as authentic.

Mr. Leisure: It may be that there will be none, but just as we have corrections here on our record from day to day there may be some corrections that ought to
17191 be made. I don't know that there are, but I would like to check that tonight.

Trial Examiner Norwood: All right. I think that is a reasonable request.

Mr. Wooden: Very well.

Mr. MacIntyre: If Your Honor please, I believe you have asked Mr. Wooden to check with respect to the identification of 1081-DD, 1081-EE, 1081-BB, 1081-W, 1081-AA, 1081-X, 1081-Y, 1081-Z, and 1081-CC so that you may know what place in the record those particular documents were identified. They were identified by Witness Anderson H. Tackett on April 8, 1938, at page 5374. The Cowham Engineering Company referred to by him there on that page is connected with the Respondents in this case, Florida Portland Cement, the Signal Mountain Portland Cement Company, the Consolidated Cement Corporation, and the Trinity Portland Cement Company through the testimony of witness Howard Miller at the Chicago hearings during January, 1939.

Trial Examiner Norwood: Will you give me that record page?

Mr. MacIntyre: I cannot give you the page of the record of the January hearing at this moment, but it was witness Howard Miller during or near the close of the Chicago hearing, January, 1939.

17192 Mr. Schofield: If Your Honor please, as I remember Mr. Miller's testimony, isn't it true that

the Trinity Portland Cement Company had no connection with the Cowham Engineering Company at the time those documents were submitted to Mr. Tackett? As I remember Mr. Miller's testimony, it was about 1933 that the Cowham Engineering Company first furnished some management services to the Trinity Company.

Mr. MacIntyre: Not merely the Trinity Company but as to other Respondents.

I think the testimony of Mr. Howard Miller, as shown on the record, will clarify the atmosphere in that respect.

Mr. Wooden: Just merely referring, Your Honor, to the testimony of Mr. Miller at the time of his appearance on the stand in Chicago, for the connection. I think that was thoroughly covered as to all periods and service of Respondents affiliated at different times with the Cowham Engineering Company.

Trial Examiner Norwood: There is testimony here as to this Commission's Exhibits 1081-X, Y, and Z; taken at Kansas City, was it not?

Mr. Schofield: Mr. Examiner, I don't believe Mr. MacIntyre has answered my question.

As Mr. Miller testified, the relationship of the 17193 Cowham Company to these four cement companies is that of furnishing certain management services and he mentioned the Trinity Portland Cement Company and I wonder what date, because it is only comparatively recently that the Cowham Company has furnished any management services to the Trinity Company, and I believe that is borne out by Mr. Miller's testimony.

Mr. MacIntyre: If Your Honor please, I would like to call Your Honor's attention in that respect to Mr. Miller's testimony as to the relationships of the directors and officers of these different companies in their control of the Cowham and the Respondents at all times since 1930.

Trial Examiner Norwood: I remember there was something of that.

Mr. MacIntyre: Because considerable testimony was taken on that and I just simply refer Your Honor's attention to that testimony.

Trial Examiner Norwood: I have noted this record page and date, here, and I will inform myself regarding that.

Mr. Wooden: Some testimony by Mr. Sunderland, in Kansas City.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: If Your Honor please, at this
17194 time we wish to offer documents which have been marked for identification as Commission's Exhibits 2401, 2402, 2403, 2404-A, B, 2405-A, B, C, 2406-A, B, C, 2390, 2391, 2392-A, B, C, 2393, 2394-A, B, 2395, 2396, 2397-A, B, C, 2398-A, 2398-B, 2399-A, B, C, D, E, F, 2400-A, B, and call Your Honor's attention to the fact that these documents are photostats of the documents identified by witness James Fryer, beginning at page 13498 as he appeared and testified January 12, 1939, at the Chicago hearings.

In further statement on that offer, I would like to call your attention also to the fact that they relate, for the most part, to the activities of the National Federation of Building Supply Associations as represented by one L. I. MacQueen and the collaborations of Mr. MacQueen in the furtherance of those activities with Mr. George Reiter, the manager of The Cement Institute.

Of course the documents themselves don't show all of the facts on their faces, but in that connection I call Your Honor's attention to Commission's Exhibits 1022-N and 1022-O, 1022-P to 1022-S, inclusive, and particularly that paragraph appearing at the bottom of 1022-P in which Mr. Neylan of the Lone Star Cement Corporation, in writing Mr. Reiter, urges him to make further contact and discuss
this matter with Mr. MacQueen further. Other ex-
17195 hibits in the record bearing upon and relevant to the exhibits now offered are 202-E, F, G, H, and I, showing clearly the connection in the activities of Mr. MacQueen of Mr. George Reiter of The Cement Institute; that is, the activities with which most of these documents deal, and these documents in this offer, now, that don't deal with the particular activities of Mr. MacQueen in his collaboration with Mr. Reiter deal with the effect of those activities upon the channels of distribution of building material supplies, including Portland cement.

Trial Examiner Norwood: Any objection?

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: I think that inasmuch as there are a considerable number of exhibits we might just as well recess until 2 o'clock.

Mr. Leisure: We would not save any time by sitting here.

Mr. Schofield: If Your Honor please, after you have checked the testimony of the witness Howard Miller, which relates somewhat, from Mr. MacIntyre's statement, to Commission's Exhibit, for identification, 1081, I wonder if you would let us examine the exhibit before you rule on its admissibility.

17196 Trial Examiner Norwood: Yes.

Mr. Schofield: Thank you.

17197 W. S. MALLORY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

*Direct Examination by Mr. Wooden.*

My present business is statistician of The Cement Institute and I have held that position since September 1,
17198 1933. Prior to that time, from the middle of the summer of 1926 until I went with the Institute I have been carrying on a business of compiling statistics on cement.

Q. What was the arrangement between you and the parties whom you supplied with statistical information during that period?

A. I had an annual fee from each subscriber.

Q. Will you name as many of the subscribers during that period that you can.

A. I don't think I could do that, but I could give you the number that I had.

Q. All right, give us the number.

A. When I first started out I had about—

17199 Q. How many subscribers did you have, Mr. Mallory?

A. I started out with about twenty out of a possible sixty-five. Along about 1930 I got up to about forty. When the depression period came on, they commenced to drop out, saying they could not afford the service, and along in 1931 I think I got down to less than thirty again.

Q. But you continued?

A. I con—

Q. Between 1931 and 1933?

A. Right.

Q. Who were some of the subscribers that you had?

17200 Mr. Conaghan: I object to the question because the list of subscribers from 1926 to 1933 is confidential for the reason that it was during the period that Mr. Mallory operated his statistical service as an individual, and that that list is confidential and should not be disclosed in this proceeding.

Trial Examiner Norwood: How would that be confidential?

Mr. Wooden: I was going to ask that question myself.

Mr. Conaghan: Confidential because it was part of the service provided not to let the other members know who were subscribing for it. That was the very—

Trial Examiner Norwood: Well, I don't see that that—

Mr. Conaghan: —foundation of the service. It was not disclosed to the subscribers at the time, and there is no reason why it should be disclosed by Mr. Mallory now.

Trial Examiner Norwood: I don't see that that would make any difference here in closing this man's mouth in giving effects here in a quasi-judicial proceeding. Objection overruled.

Read the question.

Mr. Wooden: Will you read the question, please.

17201 (Question read.)

Mr. Leisure: I have already pointed out our objection, and I would like to have it to this line of testimony, that it is not material to any of the issues in the case who the subscribers were to this service during the period of time that he was acting independently and prior to the formation of the Institute.

17202 Trial Examiner Norwood: Counsel have their exceptions on that.

By Mr. Wooden:

Q. I want to make my question a little more specific by asking to name some of the subscribers during the years 1931, 1932, and 1933, prior to the time you were employed by the Institute.

A. I am afraid I can't give you that without referring to my subscription list.

Q. I don't expect a complete list, Mr. Mallory, but the names of as many as you can recall.

A. Well, the Penn-Dixie, the Alpha, the Dexter, in the old days; that is now Penn-Dixie; the Pennsylvania, which is now Penn-Dixie; Allentown; North American, Universal;—

Q. You mean Universal-Atlas?

A. Well, that was Universal at that time.

Q. In 1930 and 1931?

A. I am not sure. I mean Universal-Atlas now.

Q. Yes.

A. But I think at that time it was Universal, but I am not sure.

Marquette, part of the time; Missouri; Ashgrove, Louisville, I think, International, which is now Lone Star.

I think I may say that all the larger companies, except Lehigh.

17203 Q. I was going to ask you about Lehigh.

A. Yes; except Lehigh.

Q. What territory would you say was represented by your subscribers?

A. Practically all the districts east of the Rocky Mountains.

Q. How did the service which you carried on on a subscription basis, how did it originate?

A. Back in 1925 I had been out of active work for seven years. I needed a job; I needed some work.

I knew more about the cement business than anything else so for about a year I made a study to see whether or not I could find any way by which I might make estimates of the probable consumption.

I had all the figures from the Dodge Company which I used in making my estimates. They were available.

I had from the Bureau of Mines all the shipments and I tried to see if I could get a formula that I might use so that I could estimate say four or five months ahead.

Q. Was this prior to the actual initiation of your service?

A. This was prior to the time that I approached the companies. Along about the middle of 1926, after I had found what I thought was the formula, I approached some of my personal friends and they gave me subscriptions, I realized then, more on a personal basis than any faith that they had in the forecasts.

17204 Q. Those friends were among cement companies, were they?

A. Among the cement companies.

Q. Were all of your subscribers cement companies?

A. Yes.

Q. All right. I didn't want to interrupt you, Mr. Mallory. Go ahead.

A. Then I slowly built it up. The first thing that I developed was using the Dodge statistics; that is, the building statistics of contracts actually awarded, and from that I estimated the probable consumption—may I make the distinction between consumption and shipments—consumption means the consumption within a State. Shipments cannot be used because they are cross-shipments between States. It is impractical to try and estimate your shipments but you can the consumption.

So I started out, as I recall, in the summer of 1926 issuing these estimates of the probable consumption for the succeeding five months.

Q. Then did you develop other lines of statistics?

A. Yes. Later on, in 1927, I started what I call the day's supply. The Bureau of Mines furnished each month a statement as to the total amount of cement in stock at the end of each month.

Well, that is a little misleading unless you can break it down, so I devised the plan of putting the stock at the end of each month in a number of days' supply, shipping 17205 supply, based on the rate of shipment for the previous 12 months.

To make it a little more clear as to what I mean, in 1928 I think we had our peak of cement stock; something over 30 millions of barrels, and at the rate of consumption at that time 30 millions of barrels meant about 75 days' shipping supply. In 1932, 30 millions of barrels would have amounted or meant over 150 days' supply.

Q. Can you recall right at this moment what the stock on hand unshipped was in 1932?

A. Well, the stock on hand—1932—I think it was 27 million barrels.

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Q. Less than 1928.

Now, you may go ahead with the development as chronologically as you can of the other items in your service.

A. Then the third thing I brought out was a year later, as I recall. The Bureau of Mines issued a monthly statement that gave production, shipments, and stock. When I say "production" I mean clinker production and cement production.

I issued a report, I prepared a tabulation, at least, which showed the total amount of capacity, estimated capacity, clinker capacity, of each district; then I figured the total amount of clinker production and estimated what the per-

centage was of the total capacity, I did the same for cement, and in that statement is an item of combina-
17206 tion of clinker and cement stock at the end of the previous month, so that each district may, each company in each district from that statement would know the percent of operations or the percent of shipments of the total estimated capacity.

Q. Does that cover all the items—

A. That covers—

Q. —of statistics?

A. That statement with this exception: Two or three years ago I added to that statement the total amount of clinker produced, so the statement was issued in July the total amount of clinker produced the first half of the year, the total amount of shipments for the first half of the year and the total amount of cement produced for the first half of the year. That was added two or three years ago.

Q. Did you put out some statistics or graphs or charts relating to prices?

A. I didn't get that.

Q. Relating to prices?

A. No, I have had nothing to do with prices.

17207 Do you mean to say that you never got out any charts or graphs that related to or analyzed the price of cement in any way?

A. I am afraid I didn't understand the question.

Q. I see.

A. Yes, I have. I have shown the prices, issued by the Bureau of Mines in relation to the production, the capacity and the clinker production or cement production.

17208 Q. Mr. Mallory, what classes of information, if any, did you obtain from your subscribers?

A. Up until 1932 I won't be sure of that date, but I think it was 1932, the only information that I had came from the Bureau of Mines and the Dodge people.

Q. Then in 1932 you think you began to get some from the subscribers?

A. As I recall, the summer of 1932.

Q. What classes of information were they?

A. I received a statement from them showing the clinker production, cement production, and their stocks each month from each one of the companies that were my subscribers.

17209 Q. You did begin to get that information direct from your subscribers prior—

A. Right.

Q. —to your employment by the Institute; is that correct?

A. That is right.

Q. Well, now, what was the handling of it, the nature and the character of the handling of that material that you obtained from your subscribers?

A. I issued a monthly report which I will characterize as the 10th-of-the-month report, which showed the production of clinker for the preceding month, the production of clinker for the preceding 12 months, the same for cement and the same for shipments, and the amount of clinker and the amount of stock on hand, and that was sent only to the companies who gave me their information.

Q. Did you at that time have a key which indicated—

A. I am sorry; I didn't hear you.

Q. At that time did you have a key which indicated to your subscribers what the figures were for each subscriber?

A. I did.

Q. And I understand you used that key prior to your employment for the Institute?

A. I started that key in 1925 as a matter of convenience in keeping my own records.

Q. Well, what did that key accompany during the 17210 period prior to the time that you got information direct from your subscribers?

A. I kept a record at that time which I obtained from the Bureau of Mines showing the figures that I have indicated.

Q. For each company?

A. For myself.

Q. I know, but for each company?

A. No, no—yes, for each company, but it was not divulged to the companies.

Q. Well, didn't the key number serve that purpose?

A. The key number was for my own records, but the information that I got from the Bureau of Mines was not given to the companies until 1932.

Q. Either by key or any other way?

A. Or any other way.

Q. Not even by key number?

A. Not even by key number.

Q. When did the use of the key numbers accompany the information that was distributed to your subscribers?

Mr. Leisure: The witness has not said that it has.

Mr. Wooden: He did.

Mr. Leisure: I think the proper way to ask him would be to ask him if it did. The witness has not said that it did accompany the information. Counsel is now asking him when that happened.

17211 Mr. Wooden: No, he said he did.

Trial Examiner Norwood: Did you ever send the key numbers to subscribers?

The Witness: After 1932, yes.

By Mr. Wooden:

Q. I am trying to fix a little more definitely—

A. How?

Q. I am trying to fix a little more definitely the time when you began distribution of the key information along with the information that went out to your subscribers.

A. I think it was mid-summer in 1932.

Q. What were the circumstances that caused that method of giving out the key-number information?

A. Well, the fundamental was fear.

Q. Fear on whose part and of what kind?

A. Fear on my part that I was going to lose all my subscribers. They had gotten down below thirty and I wanted to strengthen my service if I could, and I had—I remembered the statistics that were put out by the Protective Association in 1919 and 1920; and I always thought that was a good thing, so I reintroduced it to hold my subscribers and get additional subscribers, and it had that effect.

Q. Did the inauguration of that key-number service in information sent out to subscribers, did that come about about the same time that the Portland Cement Asso-

17212 tion had a revival of interest?

A. I just don't understand the question.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Leisure: The Portland Cement Association is not involved herein any way, Your Honor. I think we are going very far afield.

Trial Examiner Norwood: He can use the name to fix the time if that really does it.

Mr. Leisure: Well, the question does a great deal more than that.

Mr. Wooden: I just want to see if in his mind the two things were related in point of time; that is all.

Trial Examiner Norwood: I think he may show that. The objection is overruled.

The Witness: Shall I answer?

Trial Examiner Norwood: Yes.

A. I have no knowledge of what the Portland Cement Association was doing at that time, that particular time.

By Mr. Wooden:

Q. At the time of your inauguration of your key-number service to your subscribers were you aware that membership in The Cement Institute had been greatly depleted by resignations?

A. I had no information at that time as to The Cement Institute.

17213 Q. Were you aware at that time whether or not the membership of the Portland Cement Association had been likewise depleted?

A. No.

Mr. Leisure: I object.

Trial Examiner Norwood: The objection is overruled.

By Mr. Wooden:

Q. You referred to the Cement Protective Association's statistics a moment ago in connection with your use of this key-number service. I take it that you were reviving what had been used in those former days?

A. In effect.

Q. By the Association?

A. In effect, yes, with this difference: In the Protective Association reports which were used monthly, they figured the percentage change for each company from month to month.

Q. What do you mean by that?

A. I mean it showed that if a company had manufactured or shipped 10 percent more in the month of June than it had the June of the previous year, that was so stated, so when I issued it I left off all the percentage and just gave the mere facts without comments.

Q. The percentage could have been figured from the figures you did give?

A. Yes, easily.

Q. Had you been active in the cement manufacturing business yourself at one time?

17214 A. Yes. I was associated with Mr. Thomas A. Edison for a good many years.

I started in the cement business in 1899. I helped build the Edison Plant.

I operated it from 1902 to 1918 when I retired from the Cement business.

Q. During that time were you active in the affairs of the Cement Association?

A. Yes.

Q. Were you at one time president?

A. Yes.

Q. When was that?

A. I think 1910, 1911; somewhere along there.

Q. What was the name of the organization at that time?

Mr. Leisure: If Your Honor pleases, we are getting awfully far afield, here.

Mr. Wooden: The background of this witness—

Trial Examiner Norwood: There is no harm in showing that.

Mr. Wooden: I want to get the witness' background in cement.

Mr. Leisure: It is more than that.

Trial Examiner Norwood: Read the question.

(Question read.)

A. I presume it was the same as at present; al-

17215 though I don't remember.

By Mr. Wooden:

Q. You don't mean the Cement Institute, do you?

A. I though you said the Portland Cement Association.

Mr. Leisure: He did.

By Mr. Wooden:

Q. The "Association," was the way I referred to it.

A. Yes.

Q. You said you were the president of the Association?

A. I think it was the Portland Cement Association at that time, although I am not sure.

Q. Were you ever an official of an organization called the American Association of Portland Cement Manufacturers?

A. I didn't get that.

A. The only association that I have ever had any connection with was the Portland Cement Association.

By Mr. Wooden:

Q. When you were with the Edison Company did you represent it in the activities of the Portland Cement Association?

A. I did.

17216 Q. And in the Cement Manufacturers Protective Association?

A. I was not in the business at that time. I had retired from the cement business.

Q. In your statistics as to capacity what were the methods used to determine the capacity of the various mills?

A. The historical record of their clinker production, taking the three highest consecutive months' clinker production; dividing that total of the three months by the number of days in the three months, giving the daily average. Multiplying that by 365 days gave an estimated annual capacity.

Q. That estimated capacity was somewhat in excess, was it not, of, I will say, the practical capacity?

A. Well, it depends upon what you mean by "in excess." If you put it to me on the basis of percentages I can answer it better.

Q. I said "somewhat." Now I will ask you to tell us the percentage.

A. It depends on the point of view.

For instance, if you take—cement is a seasonal industry. If you take six months' clinker production it will be over 90 per cent, sometimes 95 per cent of the estimated capacity and if you take it on the basis of a single month, the maximum production for a single month, the capacity then is considerably higher than when it is figured on the three months' basis.

17217 Q. Mr. Mallory, the so-called rated capacity based on the highest three months; that is substantially in excess, is it not, of any actual output during any considerable period of time over a period of years or even a year?

A. I would say no for the reason there are ten plants that ran in excess of 90 percent for three consecutive

17218 years in their clinker production, some of them being as high as 95 percent for the three years.

Q. Haven't you used a figure of 82 or 85 per cent as being the proper proportion of that rated or estimated capacity that would represent more nearly the actual output?

17219 A. Yes, I have, because that takes in the seasonal condition of the industry.

Q. Well, then, taking the seasonal condition of the industry into account, the actual production over a period of time would be something like 82 percent of the rate of capacity?

17221 A. Well, I would say that if the cement industries had orders enough in any given year they could run 90 percent of their rated capacity.

By Mr. Wooden:

Q. I am speaking, Mr. Mallory, of the usual and ordinary results as shown by your experience with regard to the industry and not with regard to the particular companies.

A. As far as I—

17222 Mr. Leisure: Just a minute. I want to object to that last question, the question as stated I think is misleading entirely because it is based on the assumption that there were a certain number of orders taken, and there has been no testimony along that line so far.

Trial Examiner Norwood: Do you have testimony for that?

Mr. Wooden: I didn't make any such assumption.

Mr. Leisure: What would it amount to if they did have sufficient orders? That is really what the question attempts to say.

Mr. Wooden: No, I am asking—

Mr. Leisure: Sufficient orders to run the capacity. It is a hypothetical question.

Mr. Zimmerman: He confuses also the matter of production with capacity. Now, you have not taken into consideration anything for shut-downs, repairs, or all the other normal considerations that occur in every cement plant, as the witness well knows.

Trial Examiner Norwood: Those factors may enter into the picture later.

Read the question.

(Record read.)

17223 A. Based on my experience, I know of no year where there were cement orders enough to keep the plants in full operation because they can run in the winter time up to the limit of their stock house capacity.

17224 Q. This figure of 80 to 85 per cent that you say that you have used at some times, did that represent, as you might say, the actual output over the period of time that you use in such figure, 82 percent of the rated capacity?

A. I don't understand the question.

Q. Well, let me put it this way: Explain what the figure 82 percent or 85 percent represented?

A. That was a pure estimate as to—to represent what I thought might be the percentage of the estimated capacity over a period of years.

Q. The percentage of the estimated capacity; but what was that, the amount of the actual production?

A. Oh, no.

Q. Well, then, what was the percent of the estimated capacity? What was the 82 or 85 percent?

A. I cannot give you the figures from memory, what the largest clinker production was of any one year. May I make this distinction, the cement industry could produce a great deal more cement in a given year than it can clinker. It must burn the clinker and that is the bottleneck of the industry. Every cement plant has a

17225 large stock of clinker on hand nearly all the time. They have a grinding capacity of perhaps 20 percent greater than they have a burning capacity, so it is quite possible for them to produce a great deal more cement that they could ship than they get clinker. All my estimates are based on clinker.

Q. Well, I am going to ask you again, suppose the 82 percent or 85 percent figure we have been talking about represented so many million barrels, what were those barrels? Were those barrels actually produced, or what?

A. I can only reply as I did before, 82 or 85 percent was a pure estimate. I do not know.

By Mr. Wooden:

17226 Q. An estimate of what, clinker production?

A. Yes.

Q. Cement production or what?

A. The estimate of clinker production.

Q. All right, that is the actual clinker production.

A. That I don't know, whether it represented the actual or not.

Trial Examiner Norwood: It represented the estimated clinker production—

The Witness: Beg pardon?

Trial Examiner Norwood: Is that right?

The Witness: Sir?

Trial Examiner Norwood: It represents the estimated clinker production.

The Witness: That I don't know, whether 85 percent represents the maximum clinker production that we produced in any year or not. I don't have that information.

17227 Trial Examiner Norwood: But that was your estimate, wasn't it?

The Witness: That was an estimate.

By Mr. Wooden:

Q. That is what it applied to, clinker production; the 82 or 85 per cent applied to the estimated clinker production?

A. I am not sure whether it applied to cement or to clinker.

Q. Or to the clinker capacity? You see, with your uncertainty about it, that is what I want to clear up.

A. Clinker capacity is the yardstick that I use. Whether the 85 per cent applied to the annual production of clinker or to cement, I am not clear.

Q. Maybe we will get that cleared up later.

Was there a time, Mr. Mallory, when each company estimated its own capacity and reported it to the Bureau of Mines?

A. They still do.

Q. Did you make some arrangement at any time whereby the companies were given an estimated or rated capacity by some one other than themselves?

A. I didn't get the last of that.

Mr. Wooden: Will you read it, please?

Trial Examiner Norwood: Read the question.

(Question read.)

A. The estimates of capacity, I have made, my-
17228 self. The companies report to the Bureau of Mines their estimates. Mine is clinker; theirs is cement.

By Mr. Wooden:

Q. Mr. Mallory, when you became statistician for the Institute what, if any, changes were made in the type of statistical data that you compiled?

A. Not any that I recall.

Q. Were any made later on during the course of your employment by the Institute compared to what they had been before your employment?

A. No changes that I recall.

Q. Mr. Mallory, showing you Commission's Exhibit No. 204-L; that is your letter, isn't it?

Trial Examiner Norwood: That is a Commission's Exhibit?

Mr. Wooden: That is right.

A. Yes.

17229 By Mr. Wooden:

Q. In the third paragraph you state that up to 1926 the Bureau of Mines obtained the productive capacity of each district by totaling the estimates of capacity furnished by each of the companies and believing that method inadequate you went to Washington and suggested the use of the present formula.

This was written in October, 1935; which utilizes the three highest consecutive months' production.

Wherein was the estimate of productive capacity furnished by each company inadequate?

A. I found in figuring the total clinker capacity based on the actual historical production in some districts was a good deal smaller than the published figures of cement published by the Bureau of Mines and I talked it over with Mr. Klotz at that time and showed him at that time how I was figuring the estimated clinker production and for several years after that he and I checked the estimates made by the companies as against this formula.

Q. Did the estimates made by the companies, individually, and submitted to the Bureau of Mines, did they show a larger capacity, total capacity, for the industry than was shown by the three months' highest production basis?

A. Some of them, materially larger. Some of the Company reports.

17230 Q. My question was particularly as to the net result upon the showing of the industry, on that basis.

A. In some districts, materially higher.

Q. Were there any districts where it showed lower than the other basis?

A. I don't recall.

Trial Examiner Norwood: Well, would the general results for the entire industry tend to be higher?

The Witness: I would think yes.

By Mr. Wooden:

Q. Mr. Mallory, I am showing you papers marked for identification as Commission's Exhibits 808-BBB, 808-CCC, and 808-DDD and bearing the initials "W. S. M." at the bottom. Is that your authorship or are you the author of that memorandum?

A. I will have to look at it first.

(Witness examines documents.)

A. I think I wrote that, and, as I recall, it was a report that was made to the committee that was considering the plan of allocation under the N.R.A.

Q. In considering that matter at that time, did you make any special ratings of capacity or just used what had already been in effect?

A. Just used those that had already been in effect.

Q. I note the statement here that there were a number of companies that were not satisfied with their

17231 capacity ratings, present capacity ratings. Do you know why they weren't satisfied?

A. Yes, because companies figured on their potential capacity and my estimates were all made on actual historical production.

17232 Q. State whether or not, Mr. Mallory, it is true that the old method of each company estimating its

17233 capacity for itself in its own way produced variations which would not exist when you used the three months' highest actual production?

A. It is my belief that an estimate based on the historical production using the three months' formula is more nearly the real production capacity than estimates made by the individual companies.

Q. I am showing you a paper marked Commission's Exhibit 2879, for identification. Is that a copy of a letter written by you?

A. Yes, I wrote that letter.

Mr. Wooden: I offer it for the record.

Mr. Leisure: We object to the exhibit as not bearing on any of the issues as outlined by the pleadings.

17234 (COM. EX. 2879 was offered and received in evidence.)

Q. Referring to your language in this document, Commission's Exhibit 2879, what effect in your experience did the suspicions of companies about what their competitors were producing and shipping tend to have?

A. I would answer that question by saying that information that they get in their reports I believe was more nearly the truth than reports in the days that I

17235 was active in the cement industry when we used to get our sales—it is my experience, and I think the experience of almost everybody else who is in merchandising, that you cannot always believe what your salesmen tell you about competitors; whereas, here, they get the real truth as to the shipment and production.

Q. My question was: What effect did the suspicion that you referred to in your letter tend to have,—suspicions about what they were producing and shipping?

17236 A. Based on my own experience, I learned that our salesmen did not always give our—or give us, at least, the facts as they existed.

By Mr Wooden:

Q. You mean as to production and shipments?

A. As to shipments largely; that is, as to shipments largely, so, personally, I was suspicious of the reports that they brought in about the shipments from other companies.

Q. Well, my question still, though, is what effect did acting upon those suspicions tend to have?

17237 A. I don't know that it had any effect on anybody except myself.

By Mr. Wooden:

Q. You never heard that discussed in any gatherings of cement men?

A. Never.

Q. As statistician of the Institute have you attended various meetings of the Institute?

A. At the time of the N.R.A. I attended quite a number of the meetings of the committee who were working on an allocation plan. Other than that, I think, perhaps, I have been to perhaps one or two of their annual meetings, part of the time.

Q. When you were carrying on your subscription service prior to employment by the Institute, did you at times attend meetings of the Institute?

A. None.

Q. Did you ever attend any meetings of the Portland Cement Association during that same period?

A. Very many.

Q. While you were having the service?

A. Yes.

Q. The subscription service?

17238 A. Right.

Q. In the course of your statistical work, particularly with regard to reports of shipments, do you receive separate information as to shipments made for the account of other mills?

A. We do.

Q. Why do you keep that information or have it reported separately?

A. Because in our reports there are several items; the reports that they ship generally; the amount of cement that is used in manufacturing other products, like masonry cement; what they use in their own plants and what they may ship for the account of other companies.

Q. Do you distribute to members information showing the amount shipped for the account of other members?

A. We do not.

Q. You obtain the information but do not put it out?

A. Yes. It is included in the totals. We give only the totals.

Q. Do you find shipments for the accounts of other mills being reported rather frequently?

A. Occasionally. Of course, there are three companies who are not in operation and haven't been for some time; that is, the Vulcanite, the Georgia, and the Castalia and other companies ship for them each month.

Q. That has been going on as a regular thing

17239 for some time?

A. That has been going on for several years.

Q. Do you find shipments of that sort being reported by some company or other each month in addition to those three cases you named?

A. I know of no company that ships for other companies every month. It is only occasionally that—

Q. I don't mean any one company doing it consistently each month, but that sort of shipment appears every month?

A. I would not say every month, only occasionally.

Q. But frequently?

A. It is a very small percentage.

Q. Do you make any use of the information as to shipments for accounts of other companies in—or do you use it in any way? Do you use that information in any way?

A. Merely in the totals.

17240 The witness identified Comm. Ex. 2880 to 2885, inclusive, as communications written by the witness or received by the witness in connection with his statistical work for The Cement Institute.

*Examination on Voir Dire by Mr. Leisure.*

Mr. Mallory, Mr. Wooden just asked you with respect to all of the exhibits whether or not they were either written by you or received by you during the period of time that you were employed by The Cement Institute.

I now show you Commission's Exhibits 2880, 2881, and 2882, and ask you to state whether or not it is not a fact that these exhibits were written before you were ever employed by The Cement Institute?

A. That is right. I had not looked at the dates.

17241 Mr. Wooden: I hadn't, either.

By Mr. Wooden:

Q. But, Mr. Mallory, as to Commission's Exhibits 2880 and 2882 and 2881, they were either written by you or received by you as of the dates they bear; is that right?

A. That is right; yes, sir.

Q. Showing you a paper marked 2886, for identification; is that a copy of a letter that you wrote?

A. That is right. That is 1935.

Trial Examiner Norwood: Were you doing busi-

17242 ness—that is, did you have business relations with these Respondents when you wrote those letters, Commission's Exhibits 2880, 2881, and 2882?

The Witness: That is prior to the time that I was with—

Trial Examiner Norwood: With the Institute?

The Witness: Before I was with the Institute, yes.

Mr. Wooden: They show specific instances of this matter of shipment for account of other companies, and give some idea of the amount involved; and things of that sort.

17244 Trial Examiner Norwood: This Commission's Exhibits 2880, 2881, and 2822, for identification; are the facts stated in there by you, are they true?

The Witness: The telegram covers an inquiry made by us because our records showed there was a discrepancy, and we were trying to find out what was correct. The other two letters I do not remember. They were written by other people.

Trial Examiner Norwood: They were written to you?

The Witness: They were written to me and the telegram we sent.

Trial Examiner Norwood: I questioned in regard to your statements.

And this July 8, 1933, and July 17, 1933, is a time when you were furnishing statistics to Respondents?

The Witness: Right.

(COM. EXS. 2880, 2881, 2882, 2883, 2884, 2885 and
17245 2886, were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Mallory, I understand your employment by the Institute began September 1, 1933; is that right?

A. Right.

Q. What happened and how was it handled in regard to the unexpired contracts which you had with various subscribers?

A. My subscription year started on the first of July. As I recall, I inaugurated my service in July, 1926, and it went on from July to July.

Q. Well, how was it handled when you began employed by the Institute in September?

A. No more bills were sent out.

Q. Did the Institute supply the service for the balance of your subscription year, then?

A. Well, the year had already expired.

Q. Well, you had July and August, didn't you, before you?

A. Yes, but I worked for over a year before any compensation was arranged for me by the Institute, and then that was dated back to the first of September.

Q. I am not interested in your compensation by the Institute, but whether or not the contracts that you had beginning July 1, 1933, for statistical service to your subscribers, whether you furnished that statistical service for the remainder of that year through the Institute service
17246 beginning in September?

A. Well, from the first of September the same service was rendered only it came from the Institute instead of from me personally.

Q. Was that taken in satisfaction of the contracts you had for the subscription service?

A. Practically all the subscriptions I had were verbal except I think there was one period when I changed and gave the information by States instead of districts; at that time I did furnish a contract, signed contracts with my subscribers. That was abandoned and then we went back to the old basis and my subscriptions that I had were verbal instead of contracts.

By Mr. Wooden:

Q. I didn't mean to use the word "contract" in any strict technical sense, but in the sense of you having
17247 an obligation and understanding to deliver certain service for a year.

A. Well, that expired on the first of July.

Q. But you went ahead for July and August, did you?

A. Surely, without any expectation at that time that I was going to be taken over by The Cement Institute.

Q. Were you paid for the two months of July and August of 1933?

A. I don't think I was. I don't remember.

Q. I mean not even by your subscribers?

A. Not even by the subscribers.

17248 Q. Mr. Mallory, I am showing you papers marked for identification as Commission's Exhibits 550-P, Q, and R; is that your letter?

A. Yes, I would say it was mine.

17252 Washington, D. C.,
March 8, 1939.

17254 Mr. Wooden: I think the first thing in order, if Your Honor please, is a statement with regard to the exhibits that were pending and left in the custody of Respondents' Counsel over night. Any other exhibits—

Trial Examiner Norwood: Well, I have some here I can dispose of,—some pending proffers.

The objection is overruled and the fullowing Commission's exhibits are received in evidence:

Commission's Exhibits 550-P, Q, and R.

Commission's Exhibit 1081—

Mr. Schofield: Your Honor, may we see Commission's Exhibit 1081?

17255 Trial Examiner Norwood: As soon as I receive it.

Mr. Schofield: Yes.

Mr. Wooden: Commission's Exhibit 1081, if I am not mistaken, Your Honor, is the one that Mr. Schofield wished to see before you made the ruling—if I am not mistaken.

Trial Examiner Norwood: Exhibit 1081? All right.

Mr. MacIntyre: In that connection, however, your Honor, I would like to call your attention to the fact that they were offered in Chicago at or about the time Mr. Miller was on the stand.

Trial Examiner Norwood: Yes, I understand that.

Mr. MacIntyre: Part of them were also offered at Kansas City,—of the 1081 series.

Trial Examiner Norwood: Yes.

Do you want to see that now, Mr. Schofield?

Mr, Schofield: Yes.

Trial Examiner Norwood: Eliminate 1081 from my remarks just made and I will take up these others (handing Commission's Exhibit 1081 to Mr. Schofield).

(COM. EXS. 2866, 2867, 2868, 2869, 2870, 2871-A, 2871-B, 2872-A, 2872-B, 2873, 2874, 2875, 2876, and 2877 were offered and received in evidence.)

17256 Mr. Schofield: Your Honor, I believe Mr. Leisure has a short statement to make as to Commission's Exhibit 1081.

17260 Mr. Leisure: This Commission's Exhibit 2878-A to T, for identification, consists of excerpts out of the testimony of certain of the Respondent witnesses be-

fore the hearings of the Committee on Interstate Commerce, known as S-4055.

The publication is dated March 9 to April 10, 1936. I assume, Your Honor, that if excerpts of this kind are
17261 to be received that we will also, when the proper time comes, have the time to introduce other excerpts from the same volume, and the reason I raise the point now is that I want to add that to my objection at the present time, unless that is understood, because I consider it as a series of letters.

If one letter were offered at the present time I would object to the letter being received unless the letter to which it was a reply, or however the series might run, could also be received.

17262 Trial Examiner Norwood: I have done that several times during this hearing when part of the transaction comes up.

Mr. Leisure: With that understanding, I will not raise any objection.

Mr. Wooden: I wish to point out that these excerpts are offered and are competent and receivable in evidence as admissions of Respondents representatives and for that reason it does not follow that all other declarations made at the same time or on the same occasion are receivable as such. There may be self-serving declarations made at the same time or on the same occasion and the proper method of proving such matters is to call the parties who made them and let them testify and subject themselves to cross examination but statement, whether under oath or not, that are in the category of admissions made by parties are receivable against them.

Trial Examiner Norwood: Yes; any part or statement which relates to, modifies or explains that same subject-matter would be admissible. We have to decide that when it is offered. It must pertain to the same thing, and so on.

Mr. Wooden: That is right. If it were necessary to make these statements of admission—if it is neces-
17263 sary to make them understandable I wouldn't raise any point about them, but if it is a question of everything else that is said on these occasions by the parties, we might as well put the whole book in; everything that the cement people presented.

Mr. Leisure: Mr. Wooden raises the very point I wanted to raise:

It is my belief and our position that if a letter were written which he claims constitutes an admission, naturally any one letter we would want to put in he would claim was a self-serving declaration, but nevertheless, I contend if he is allowed to put in one letter of a series of correspondence pertaining to other letters, as an admission, that we have the right to introduce the other letters in that chain of correspondence.

Now, just as we have the right and just as the rule of law is clear with respect to that, there naturally having been no specific rule of law laid down as yet on this specific book, I say and it is our position that when these witnesses testify with respect to other matters in this book, for instance, the bill itself under which they are testifying, it is our position that the other matters in the book such as we may select are clearly receivable in evidence as bearing upon their testimony.

17264 Trial Examiner Norwood: The principle is clear on that. These other matters will have to relate to the same thing and are covered by the admissions and none of them—in other words, you can't put anything in just because it is the same book or testified to in the same book, or anything like that.

17269 Mr. Wooden: I want to challenge the statement that this was not sworn testimony. Mr. Zimmerman says as far as he is able to learn it was not, but whether or not it was, he is in error in stating that it was offered on the basis of it being a sworn statement.

Mr. Zimmerman: That was your exact statement made yesterday in the record.

Mr. Wooden: I--

Mr. Zimmerman: That these were offered as sworn statements.

Mr. Wooden: I also state—

Mr. Zimmerman: The record shows it.

Mr. Wooden: —that the statements of parties
17270 whether sworn or not are receivable against them.

Trial Examiner Norwood: Yes.

Mr. Wooden: And they are offered on that basis, as well as on the other.

Trial Examiner Norwood: Well, I will retain the exhibit until I can examine it.

Now, may I have those others?

Mr. Schofield: Yes, Your Honor. I am referring to

Commission's Exhibits 1081-AA, BB, CC, W, X, Y, and Z. On examination I am informed that objections have been stated to them.

Trial Examiner Norwood: Yes.

Mr. Schofield: Thank you very much for letting me examine them.

(COM. EX. 550-P, 550-Q, and 550-R was offered and received in evidence.)

(COM. EX. 1081-AA, 1081-BB, 1081-CC, 1081-W,
17271 1081-X, 1081-Y, and 1081-Z was offered and received in evidence.)

Mr. Wooden: Your Honor, I understand from what has been said that there is no objection to this pending exhibit, Commission's Exhibit 2878,—is it A to T?

17272 Mr. Wooden: Of course, Mr. Zimmerman, you should interpret my statement to mean what it obviously meant, that so far as this document does cover the statements in question that it is a correct reflection of those portions of the transcript.

That is all I am trying to say.

Mr. Zimmerman: You mean that the words have been correctly copied?

Mr. Wooden: Yes.

Mr. Zimmerman: Oh, I would not raise any contention—

Mr. Wooden: And that the statements were made.

Mr. Zimmerman: —that your amanuensis has been quite proficient in the matter of copying certain words selected by you from some place in the proceedings.

Mr. Wooden: All I am seeking to establish at this time is whether it is going to be necessary, in view of technical objections, to call the Reporters who took this testimony and have them bring their notes in here and testify that these statements were made.

Now, that is all I want to find out at this time.

Mr. Zimmerman: Well, you heard my statement.

Mr. Leisure: Better mark the printed copy, Mr. Wooden, instead of the typewritten copy. I have not raised
17273 any objection as to its being properly copied.

Trial Examiner Norwood: Well—

Mr. Wooden: As to whether the printed transcript is correct.

Mr. Leisure: No, I do not have any objection to that. I do think it would be better to mark the printed copy, for the reasons that I have outlined, because as it is copied

it looks as if it were one continuous document; whereas, it is not.

Trial Examiner Norwood: I understand that plainly appears on this copy here; it shows the basis.

Mr. Wooden: The basis, shows the excerpts.

Trial Examiner Norwood: Yes, it makes it very clear that these are excerpts from that record.

I will take it under consideration. I want to examine the paper to see if, as stated, they are really admissions or—I want to determine their relevancy, and so forth.

Go ahead with the witness.

Mr. Wooden: There is still another group and collection of pending exhibits that I wish we could dispose of at this time.

Trial Examiner Norwood: Commission's Exhibits 2390 to 2406?

Mr. Leisure: What ones are those? What are those?

17274 Mr. Wooden: Those MacQueen dealer exhibits.

Mr. Leisure: Oh, yes.

As to those exhibits, 2390 through 2406, they consist of a large file of letters written by members of a National Federation of Builders' Supply Associations, among themselves. There is not the slightest evidence that a single one of these letters ever came to the attention at any time of the Respondents.

They have been offered on the theory that they have been identified in some way, and are connected up in some way with this record. In a manner that would make them admissible. They were, in fact, identified as follows:

Mr. James Fryer, on January 12, 1939, in Chicago, pages 13500 of the record to 13520, identified the signatures as being the signatures of a Mr. L. I. MacQueen, and other officers of the National Federation of Builders' and Supply Associations. Mr. Fryer admitted receiving copies of some of these documents. He never saw some of the other documents which are now being offered.

These documents were received in evidence in the case of the Federal Trade Commission against the dealers, and were introduced there on the ground that they proved that the dealers coerced the manufacturers. They are now apparently being offered for a second purpose, on a new ground, with some theory that the dealers did not

17275 coerce the manufacturers but that they—on this new

ground—became co-conspirators with the manufacturers. These documents were asserted to be relevant and material on the issues raised in Commission's Exhibits 1022-N to S and 202-E to I.

Now, let us take a look at that exhibit, Exhibit 1022-N and O. It is dated July 10, 1935, and it simply states this: "We have just received a request from Captain Collins to attend a joint conference * * * at his office in Washington to discuss cement purchases. He requests that both the dealers and the manufacturers of cement should be represented at this conference by a small committee. We are informed that the dealers will be represented by * * * L. I. MacQueen, Secretary of the National Federation of Builders' Supply Associations."

Now, if that exhibit makes these exhibits admissible then they are admissible.

Commission's Exhibits 1022-P to S, and 202-E to I, also simply refer to the meetings held with Captain Collins in July and August of 1935, concerning the purchase by the United States Government of the cement for the W.P.A.

I think that a study of those exhibits will also show that there is not the slightest color of excuse for saying
17276 that these exhibits are admissible because of any connection with that exhibit.

17277 These conferences as shown were attended at the request of Captain Collins and there is no proof of any agreement or that Captain Collins was conspiring with L. I. MacQueen or that anyone else was at that time, and there is nothing in the record to that effect except inferences, if one should seek to draw them.

Statements by persons attending conferences at the invitation of the United States Government are not admissible against other persons attending such conferences.

The documents themselves constitute statements made by the manager and secretary of a dealer association in the nature of puffing up the services rendered to dealers by that association and that is exactly what these documents which are now being offered tend to prove, if they tend to prove anything.

There is no showing that manufacturers ever saw the copies of these documents.

There is no showing that manufacturers ever acted upon the documents in any way.

In the offer of proof concerning these documents Coun-

sel for the Commission states on page 17194 of the record that the documents relate to "the activities of the National Federation of Building Supply Associations as represented by L. I. MacQueen and the collaborations of Mr.
17278 MacQueen in the furtherance of those activities with Mr. George Reiter, the manager of the Institute."

It is also stated that the purpose of this offer is to "prove the effect of those activities upon the channels of distribution of building material supplies, including portland cement."

All statements concerning the effects of acts by dealers or manufacturers are mere inadmissible hearsay. If documents offered on the basis of L. I. MacQueen and the National Dealer Federation being co-conspirators, as has been done in the past with certain material dealers—I have reference, now, to page 5885 and 5886 where Mr. MacIntyre, referring to the documents written by Mr. MacQueen and Carnahan concerning conferences with Captain Collins stated:

"It is contended by Counsel for the Commission that in this case the documents are in no different class whether or not they are writings of the Associations of Dealer Organizations, than the documents represented by 1043-A to 1043-SSSSS. That is, they are writings of co-conspirators.

There we see, that in truth and in fact, these documents are being offered on the basis that the authors of these documents are co-conspirators.
17279 The record itself does not establish that L. I. MacQueen or his associates were ever co-conspirators in any sense of the word.

Mr. George Reiter made reference to L. I. MacQueen on the following pages of the record: 4317 through 4319. This refers to the meetings with Captain Collins and only to the meetings with Captain Collins. No showing of any agreement or understanding is even purported to be shown in the record.

Pages 4329 and 4330 also refer to Captain Collins and again no agreement or understanding is even intimated in the record.

On pages 4367 and 4368 where it again appears, they also refer to dealings with the W.P.A.; no agreement or understanding is even remotely suggested.

The same applies to the testimony of J. F. Naylan on

page 6482 of the record and none of the exhibits in which L. I. MacQueen is mentioned indicate any agreement or understanding on this subject and I refer Your Honor to Exhibits 867-SSSSSSS through 867-UUUUUUU, and 549-MM and Exhibit 202-Q.

This being the state of the record both as to the oral testimony and the documentary evidence, we object to all of these exhibits as being incompetent, irrelevant and immaterial. They do not prove or tend to prove any 17280 of the issues in the complaint.

All these documents are dated during the code period or during the interim period immediately following the code. The documents during the code are the Exhibit numbers 2390, 2391, 2392, 2393, 2394, 2395, 2396, and 2397.

All of them contain numerous hearsay statements which are inadmissible and would be, even under the theory of admissions of co-conspirators, since they do not constitute any admissions of facts.

All of these documents contain numerous expressions of opinion which the witnesses could not make if they were on the witness stand. If they are offered as admissions of a co-conspirator, and there is no other possible basis to even consider them, there is no evidence, as we have pointed out, that L. I. MacQueen or the National Federation of Building Supply Associations has ever acted as co-conspirators or anything approaching agreement or understanding with the manufacturers, and there is no allegation in the pleadings to that effect. The statements contained in these documents are not such statements as would constitute admissions even if made by co-conspirators in that they are not statements made of any acts in furtherance of any conspiracy.

They do not come even under that necessary rule 17281 of evidence.

For these reasons we object to the documents.

Mr. MacIntyre: If Your Honor please, of course Mr. Leisure could have cited to you many other exhibits in this record that failed to refer to any discussion between Mr. Reiter and Mr. MacQueen and as to what they sought to accomplish.

He has cited you a few that do not bear on the situation and we admit he could cite many more.

He has stated that some of these documents were written

in the interim period after the code. I don't know just what he is talking about, there. He might mean the period between the Schechter decision and the time the complaint was issued in this case by the Federal Trade Commission, or he might describe the interim period as between June 1, 1935, and the time of the World's Fair in New York in 1939; all of them interim periods, of course.

Now as to the documents, however, that are looked upon as showing some connection and cooperative action between and among Mr. Carnahan, Mr. MacQueen and Mr. George Reiter, the manager of the Cement Institute, are those that were cited by me yesterday and the references appear on pages 17194 and 17195.

You will find in one of those exhibits thus cited
17282 statements showing that Mr. MacQueen, Mr. Carnahan, and Mr. George Reiter, general manager of the Cement Institute, had a meeting in Washington, D. C., on July 10, 1935, at which they discussed and agreed among themselves the matters which they would present to Captain Collins of the Procurement Division when they met with him on July 12.

Trial Examiner Norwood: I shall take the exhibits for further study. In the meantime, do the other Counsel have any objection?

Mr. Leisure: If Your Honor pleases, I would like to point out that the document Mr. MacIntyre has just referred to comes much subsequent to the date of most of these papers.

Trial Examiner Norwood: What document?

Mr. Leisure: 1022-M; and if he is going to allege a conspiracy he can't go back before the date of his own alleged conspiracy. It had to have a beginning, and, perhaps, an ending.

Mr. Wooden: There is another exhibit in evidence, the number of which I can't cite, offhand, but I can produce it, which shows in the summer of 1934 the Builders Supply Association represented by Mr. MacQueen and the Institute and still another body, I think, of dealers, had—their minds had met upon the proposition of what consti-
17283 tuted proper trade for the manufacturer and what constituted proper trade for the dealer.

Trial Examiner Norwood: I should be glad if you gave me that citation, too, and I will study this.

17284 *Direct Examination by Mr. Wooden.*

Q. Mr. Mallory, will you explain just wherein the statistical service of the Institute has differed from the statistical information provided by the U. S. Bureau of Mines and the F. W. Dodge Corporation.

A. The statistical information of The Cement Institute is based on the information obtained from the Bureau of Mines and the Dodge statistics.

Q. What is the difference between them?

A. The Bureau of Mines gives the totals for each district and that is all. The Institute, in one of its reports, makes a percentage comparison for each district between the estimated clinker capacity of clinker production of all clinker shipments. It also gives—

Q. Pardon me, there. Will you state what purpose that particular thing gives that the Bureau of Mines doesn't give?

A. Simply to show what percent or what proportion of the estimated clinker capacity is being produced or shipped.

Q. All right. Now, go ahead.

A. That same report gives the—as I said yesterday, take the July report, for instance—the total number of barrels of clinker that have been produced for the prior six months. Also the total number of barrels for the same period of cement and the total number of barrels
17285 that have been shipped for the same period.

Q. Any other differences?

A. No.

Q. Now, as to the Dodge Corporation. The differences in your service, based on it.

A. The Dodge figures are one of the factors that are used in making my estimates of probable consumption, and they are issued showing the contracts in the three preceding years so that it can be seen in which particular States there may be increases or decreases in the amount of building contracts that have been awarded, and that covers each of the nine districts east of the Rocky Mountains, and from that information plus other information that I have I make an estimate as to the probable consumption for the succeeding five months.

Q. Would you say that the last service that you referred to is an attempt to forecast the demand?

A. It is an estimate as to the probable consumption.

Q. And would you say that the other form of service based on the Bureau of Mines' statistics is an effort to forecast the supply?

A. No, because we are dealing with what has already occurred and putting it in what I think is more intelligent form.

Q. But the stock on hand, for instance, is quite a factor in the available supply for the future, isn't it?

17286 A. The stock on hand at the beginning of the shipping season in normal times reaches its maximum and it usually decreases every month until it gets down to the end of the shipping season, which is about the first of November.

Q. Did the available stock-house capacity tend to increase during the early part of the depression years?

A. I don't understand the question.

Q. Did you hear it or you don't understand it?

A. No; I just didn't get it all.

Q. Did the available stock-house capacity of the industry tend to increase, or did it increase during the early years of the depression?

A. As I recall, in 1931 and 1932 it was somewhat less than it was in 1928 and 1929.

Q. You mean the physical capacity of the stock-houses?

A. I thought you were talking about the stock.

Q. No, the stock-house capacity.

A. Oh, capacity. As far as I know, it was practically the same.

Q. Did the stock on hand tend to decrease following 1929?

A. It did decrease slightly.

Q. Did you say it increased?

A. Decreased.

Q. In other words, shipments exceeded current production?

A. Not that I can remember.

17287 May I make this explanation: In the cement industry we have a rather unusual condition. In 1928, I think it was, or 1929, I am not sure, we reached our maximum storage capacity, some 30 odd million barrels, so when the depression came on and our shipments fell off, all we could manufacture, assuming the stock-houses were all full, and as far as I know they practically were, all we could manufacture was what we shipped.

Cement must be stored under cover and you could only put into the stock-houses what you took out of them and that tended to make the production and shipments quite similar.

Q. But the stock on hand decreased somewhat during the early part of the depression?

A. Somewhat, yes.

Q. Has it further decreased since then?

A. It has gone down some, yes.

Q. Has the tendency been—has it been in that direction for the past four or five years?

A. Yes. My recollection is—I won't be sure of these figures—my recollection is that last March or April—that is the period of the year when we have the maximum stock—it got somewhere between 22 or 23 million barrels.

Q. As against 30?

A. Yes, as against 30 at the peak.

Q. That was the stock on hand, not the stock-
17288 house capacity, of course.

A. No, that is the stock in the stock houses.

Q. What has been the extent of the statistical service given to companies on the Pacific Coast?

A. We send them the reports that are based on the Bureau of Mines' figures.

Q. You mean by that the stock-on-hand, production and shipments?

A. Right.

Q. How long has that been done?

A. I can't answer that, definitely; I would say perhaps a year or two.

Q. Did that service to the Pacific Coast begin about the time Mr. Reiter went out there in 1936, would you say?

A. I think so.

Q. Mr. Mallory, has the Bureau of Mines reported clinker capacity and clinker production?

A. They report clinker production. They do not report clinker capacity.

Q. Referring to Exhibit 230-C, for identification.
17289 You are the author of that document, are you (handing document to the witness)?

A. Yes.

Q. Referring to that, if necessary, to aid you, will you state, Mr. Mallory, what your statistics showed with reference to the percentage of privately-owned construction

contracts and publicly-owned construction contracts over a period of years?

A. I could not do that from memory, but I can from the chart. I have no chart with me.

It is my recollection it goes back some 20 years.

Q. This statement that I directed your attention to; will that enable you to answer my question (indicating on the document)?

A. Shall I read this?

Q. I would prefer you to make use of it and just testify, then, generally, about it.

17291 Trial Examiner Norwood: Can you refresh your recollection and answer that question?

The Witness: Yes, I can.

Trial Examiner Norwood: Go ahead.

A. It is so stated here that during the period from 1920 to 1929, inclusive, privately-owned construction contracts were 68 percent and publicly-owned were 32 percent of the total contracts, and may I add, this information was obtained from the F. W. Dodge Company in their monthly report. Then in the 7 years from 1930 to 1936—this letter was written in 1936—privately-owned contracts were 45 percent and publicly-owned, 55 percent. The chart shows that privately-owned contracts have increased from 38 of the total in 1934 to 48 in 1936.

17292 Speaking from memory, in 1937 the privately-owned contracts were a larger percent than the publicly-owned.

In 1938, however, the two lines crossed again and publicly-owned contracts were slightly more than the privately-owned.

By Mr. Wooden:

Q. Mr. Mallory, showing you Exhibit, for identification, 808-BBB, and calling your attention to the 4th paragraph (handing document to witness).

Will you state the names of companies which were not satisfied with the capacity rating that you were then assigning to them, this being in February, 1934?

(Witness studies exhibit.)

A. The fourth paragraph reads as follows: "There are quite a number of companies like—"

Mr. Wooden: No—

Mr. Leisure: Just a moment—I think if the witness is going to read we should have the exhibit offered first.

Trial Examiner Norwood: Yes.

Mr. Wooden: I did not ask him to read the paper, I merely—

Trial Examiner Norwood: He wants you to refresh your memory from the paper.

The Witness: I see.

17293 Trial Examiner Norwood: And if it does refresh your memory, you may then testify independently of the paper.

The Witness: Without looking at it I could not give you the names of all the companies here.

By Mr. Wooden:

Q. Well, you can look at it.

A. By looking at it, I can.

Q. Well, you may look at it, but do not read from it; that is the point.

17294 The Witness: The Great Lakes—the plant of the Lawrence Company in Maine; the Keystone, Missouri; their St. Louis plant; San Antonio; Republic; and I think the plant of the Wabash Company at Osborne.

Now, the reason—shall I give the reason?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Yes, I would be glad to have you give the reason.

A. The reason that—those plants all started in operation after the period of heavy shipments, and due to the decreasing demand for cement never have been able to run full capacity, based on my estimate that I have used, the only estimate that I could give them was what they actually produced, and was eminently unfair to the companies, but I could make no changes in my method of estimating.

Q. Have you made any changes in your method of estimating, since the time that you listed these concerns in February, 1934?

A. No, we have not.

17295 Q. I will ask you to look again at Commission's Exhibit 808-BBB, and the fourth paragraph, and see if you can refresh your recollection any further as to the names of companies that were not satisfied with their capacity rating.

A. (Witness studies exhibit) I seem to have omitted the Santa Cruz.

Q. Any more?

A. (Witness studies paper) And Ashgrove.

Q. That is Ashgrove as a whole, or any particular plant?

A. The Louisville plant.

Q. That is Louisville, Nebraska?

A. Yes.

17296 Q. Mr. Mallory, I am showing you a paper marked Commission's Exhibit 2887, for identification (handing document to the witness). Are you the author of that document?

A. I am.

Q. Will you state the circumstances under which it was prepared and what distribution was given to it?

A. As I recall, that was sent out to my subscribers in 1929 and it was to make a comparison between the production and shipments of these five districts. The increase in the contracts awarded showing a decrease in the factory price, and showing the relation between the increase in production, in percentages, and the decrease in price.

Q. Is the document in your handwriting or a reproduction of your handwriting?

A. Yes, I think I made that.

Q. The entire document?

A. I think so, yes.

Q. Yes.

A. Now, it all comes to me, I was trying to show there were two fallacies.

17297 Q. Yes.

A. The one fallacy being that a reduction in the price increased consumption of cement; I was trying to show a second fallacy that when you can have large production of course your manufacturing costs come down.

Q. You were trying to show the fallacy of the latter?

A. It looks so here, without—no, no, I am wrong about that. I was showing that during the period of 1920 to 1928 the production had increased 1.4 percent, during that same period, prices had decreased 22.2 percent.

Q. But were you trying to show anything in the nature of a fallacy regarding advisability of full production?

A. No, but the—there is no relation here between the reduction in price and the increase in the production.

Q. Well, you have on this paper fallacy No. 1—

A. There was—

Q. —and fallacy No. 2.

A. And there was a letter that went with that, the details of the letter described the difference in different districts. Now, for instance in district—

17301 (COM. EX. 2887 was offered and received in evidence.)

Q. Mr. Mallory, referring to Commission's Exhibit 2887, what was the fallacy No. 2 which you undertook to demonstrate?

A. Now I get it, I did not get it when I looked at it first. Fallacy No. 2 says that to run full production in hopes of reducing the manufacturing price is a fallacy.

Q. Price?

Mr. Zimmerman: Cost.

A. The manufacturing cost; thank you. That to run full production to reduce the manufacturing cost is a fallacy because it has the effect of decreasing the price,

17302 as I show here, the production increased 1.4, and the price went down 22 percent.

17304 "Q. Do you question, Mr. Mallory, as a man experienced in the cement business, and dealing with cement concerns over a long period of years, that it is cheaper to produce cement per barrel when you are running more nearly to capacity than when you are

17305 running at, say, only half capacity?")

A. When you are running more nearly full capacity it is cheaper; but that's not the only factor in the situation.

By Mr. Wooden:

Q. What is the other factor?

A. If you, by running more nearly full capacity reduce the market price, you may—and it has been the experience—be in position of producing very serious losses.

Q. In other words, you may offset—

A. Right.

Q. —the gains in lower cost of production by having your price lowered?

A. Yes.

Q. (Handing documents to witness) I am showing you papers marked for identification as Commission's Exhibits 953-fflX, YY, and ZZ. The first of those bears your name and address in the upper lefthand corner. Are you the author of that document?

A. Yes, I wrote that letter.

Q. I call your attention to the fact that while the document is dated May 14, 1929, that on the end of it—it is a photostat copy—there appears to have been placed some additional material which contains data for years running as late as 1929 to 1933, inclusive.

Can you explain that?

A. I can.

17306 Q. All right.

A. The letter of May 14, 1929, was a warning, as I saw it, to the cement industry, that we had passed the peak of building construction, and that we could look forward to a period of smaller demand during the succeeding five years. I gave my reasons for what I thought, in May of 1929, that was going to happen, and subsequently after the five-year period had passed I added this memorandum, and I presume that I sent that letter to somebody calling attention to the fact that the volume had gone down from—the shipments had gone down—from 169 million to 64 million during that five-year period, and the price had decreased at the same time.

Q. The entire document, then, is yours?

A. Yes.

17307 (COM. EX. 953-XX, 953-YY, and 953-ZZ was offered and received in evidence.)

A. Yes.

Q. Referring, Mr. Mallory, to Commission's Exhibit 953-ZZ, you say that you feel very certain if the

17308 physical stockhouse limitation, which exists in most districts, is used as the foundation on which to build your structure, which can be designed to cover the existing inequalities, and each company will realize and act on the fact that the district in which its plant or plants are located can only produce what is shipped, and to balance its production with the demand, whatever it may prove to be, is good sound business, and it is probably the only way in which your industry can obtain a reasonable profit during the next few years.

What were the districts in which the physical stockhouse limitation did not act as a natural limitation?

A. As far as I know, it acted in all line districts.

Q. You say it exists in most districts?

A. Well, I should have said all districts.

Q. What were the existing inequalities that you referred to in that paragraph?

A. May I read it?

Q. Yes (handing document to the witness).

A. I don't remember—I don't remember what they referred to.

Q. Were there inequalities with regard to production?

17309 A. That, I don't remember.

Q. Were there inequalities with regard to prices?

A. I don't remember, but I am pretty sure. I had no thought of prices at that time when that letter was written.

Q. Did you have reference to any inequalities in or between different districts with such a thing as some districts being able to ship more nearly what they produced than other districts?

A. No, I did not, but that often exists.

Q. You have no present recollection?

A. I have no present recollection.

Q. What the existing inequalities you referred to there, were?

A. I have no recollection.

Q. Showing you a paper now, Mr. Mallory, marked Commission's Exhibit 2888, for identification. Is that a copy of the letter that you wrote (handing document to the witness)?

A. Yes, I wrote that.

17311 (COM. EX. 2888, was offered and received in evidence.)

Q. Mr. Mallory, were you continuing to work upon the proposed allocation of business plan as late as January, 1935?

A. I don't remember whether I was or not. I think not, however.

Q. This letter 2888 is addressed to F. G. McKelvy, vice-president of Alpha Portland Cement Company. Why were you writing to Mr. McKelvy as distinguished from anyone else, why did you write this letter?

A. May I see the letter?

Q. Surely (handing document to the witness).

A. May I refresh my mind? I don't remember what plant 206 is.

Q. I was going to ask you about that. I can't help you, myself, offhand.

A. I do not remember what 206 is. May I refresh my mind?

Trial Examiner Norwood: Looking at some other document?

The Witness: Yes; which I have in my pocket.

17312 Trial Examiner Norwood: Certainly.

(The witness refers to document which he procures from his pocket.)

A. Oh, yes; 206 is the Great Lakes plant at Buffalo, and they were one of the plants that were covered in the answer to my other question as to who were dissatisfied with my estimate of their capacity because they were never able to run full.

By Mr. Wooden:

Q. They were also affiliated with the Alpha?

A. No, it is a Lehigh Company. I presume Mr. McKelvy asked me the question so I sent him this information.

Q. You say you presume he asked you the question. Your letter makes no reference to any letter of his?

A. No; he probably asked me, because I see him frequently.

Q. Didn't you send him your estimates of the clinker capacity of all the plants; not merely that of the Great Lakes? (Handing document to the witness.)

A. I don't remember. What I probably sent him was the clinker capacity of the plants in that New York State district, but I don't remember.

Q. Well, you say in the first paragraph you are enclosing a statement showing "the distribution of the 1934 shipments from plants on the basis of the present estimates of the clinker capacity of all the plants, both active and inactive."

17313 A. He wouldn't be interested in the capacity of the plant in Texas. He would be in New York State.

Q. Then you say: "You will also find attached a tabulation giving two estimates distributing the 1934 shipments on the basis of the clinker capacity of the active plants—one estimate contains the present clinker capacity of plant 206, and the other an adjusted capacity, which has been claimed for this plant."

Plant 206, you said, was the Great Lakes plant?

A. Right.

Q. I will ask you again why Mr. McKelvy of the Alpha Company, why you were giving this information about an estimate of the plant of another company?

A. He probably asked for the information.

Q. Was this adjusted capacity which has been claimed for that plant 206, was that ever allowed?

A. No; not on my records.

Q. Who claimed it?

A. As I recall the Great Lakes, based on their actual clinker production, had a capacity on my records of about a million nine hundred thousand barrels annually. They claimed about three million barrels annual capacity.

They were never able to run; they started in after the heavy demand had ceased, and they have never been able to run to capacity.

17313½ Q. Do you question that they actually could have produced that amount if they ran?

A. I don't know, but I feel that—I am quite confident they could produce more than a million nine hundred thousand.

Q. Substantially more?

A. That, I don't know.

Q. But, as you said a while ago, if the company came into existence when the demand had sharply lessened, its record of actual shipments during such a period would not at all reflect what it was capable of producing, isn't that right?

A. That is right.

Q. You told Mr. McKelvy in this letter, Exhibit 2888, that before you made any exhibits of the clinker capacity for 1935 it would be necessary for you to know what deductions will be made for the inactive plants of the smaller companies. Why was it necessary?

A. After the January report of the Bureau of Mines was received—and that is usually about the first of February—I revise my estimates of clinker capacity, adding to the capacity of any plant that may have run a period of three consecutive months at a higher rate than the amount that I used on the previous estimate.

17314 I take off at the same time any plants that have been dismantled, reducing the total amount of my estimate for clinker capacity for the country and that district.

Q. Did you obtain from Mr. McKelvy the information that you asked for in that connection?

A. No, I got that from the Bureau of Mines.

Q. After getting it from the Bureau of Mines in January, 1935, then did you make deductions for the inactive plants of smaller companies?

A. I don't remember, but I don't think I did.

Q. Or did you make an addition for the new plant of the National Portland Cement Company that you referred to in Exhibit 2888?

A. National, did you say?

Q. Yes.

A. Yes; they were added to the total of district No. 1.

A. I made an estimate of their probable capac-
17315 ity not based on any information that I had from the National at that time.

By Mr. Wooden:

Q. They were not members of the Institute?

A. They were not members of the Institute.

Q. I am now showing a paper marked Commission's Exhibit 2889, for identification. Did you receive that letter from the Keystone Portland Cement Company, Mr. Harold Scott, the president?

A. I think I did, yes.

*Examination on the Voir Dire by Mr. Leisure.*

Q. Did you receive this from one of the Respondents, the Keystone Portland Cement Company?

A. Yes.

Mr. Leisure: I have no objection.

Mr. Zimmerman: I haven't anything to add.

(COM. EX. 2889 was offered and received in evi-
17316 dence.)

Q. Mr. Mallory, I am showing you a paper marked Commission's Exhibit 2890, for identification. Did that letter or document ever come to your attention before?

17317 A. It may have, but I don't remember.

Q. Your name is written—

A. Oh, that's right—undoubtedly I saw it.

Q. Is that your writing?

A. No.

Q. Do you know whose writing it is?
A. I do not.
Q. It is addressed to The Cement Institute, but you think you saw it, do you?
A. May I see it?
Q. Sure.
A. Look at the date of it?
Q. Sure (handing document to the witness).
A. That probably went to Mr. Lundborg.
Q. (Showing document to the witness) Well, I will show you now papers marked for identification Commission's Exhibits 2891-A to D, inclusive, and also Commission's Exhibits 2892-A and B. Now, will you look at Commission's Exhibits 2892-A and B and tell us if that is a copy of your letter written in reply to Exhibit 2890, for identification?
(Witness studies document.)
A. Apparently it is. I remember now. I had forgotten all about it.
Q. Then are exhibits marked Commission's Exhibits 2891-A to D, inclusive, the material that is referred
17318 to in Exhibit 2890, and about which you commented in Exhibits 2892-A and B?
A. I presume it did, but I don't recollect it. If I read my letter, I probably could get at it.
Q. Will you look at Commission's Exhibits 2892-A and B (handing documents to witness)?
A. Yes.
Q. And then tell us?
(Witness studies documents.)
A. Yes, I remember; I remember it now.
Q. Then are papers marked Commission's Exhibits 2891-A to D—
A. I would think so.
Q. —the papers that are referred to in your letter?
A. Yes, yes, I would think so.
Q. Can you state the source of the figures, on production and shipments, and other data, in Commission's Exhibits 2891-A to D?
A. Where they obtained the information?
Q. Yes.
A. I do not know.
Q. Do you know where any such information is available outside of the Bureau of Mines?

A. Let me look (witness examines exhibits). I would say those were Bureau—without being definite—I would say those were the Bureau of Mines' figures.

17319 Q. Yes.

A. 1928 it was .175 minimum.

Q. What would you say as to the figures, the table figures, appearing on page 2891-B?

A. I would say they were Bureau of Mines' figures.

Q. And the figures appearing on 2891-A, what would you say about those?

A. I think they are Bureau of Mines' figures; I think they are all Bureau of Mines' figures.

17322 Trial Examiner Norwood: With regard to Commission's Exhibits, for identification, 2890 to 2892, inclusive: They consist of letters from the McGill Commodity Service to this witness enclosing some tabulations here giving facts as to production or average production over a good many years and making some statements regarding the competitive conditions in trade, and this witness' letter, Commission's Exhibit 2892-A and B, for identification, takes issue with him and point out some incorrect figures or estimates on it and also differences in trade conditions.

Mr. Leisure: But, Your Honor, at least one of the points of my objection that I intended to make—if I didn't, I want to make it now—was that this method of offering evidence would totally deprive us of cross-examination.

These are statements made by third parties over whom we have no control.

Trial Examiner Norwood: I find these statements just as much in your favor as against you, as far as that goes.

Mr. Leisure: The principle of the thing—I don't think they ought to be admitted. The third parties are not here.

17323 They make statements which are received in evidence as binding on the Respondents.

We have no right of cross-examination.

Trial Examiner Norwood: I can't see, now, how they can be admitted.

I think Counsel for the Commission can take these papers and one of these parties right here has this information and I think he can take it and bring it all out, the information that is in that, through this witness.

Mr. Wooden: Your Honor, I am seeking here to show the act and attitude of Respondents towards certain statements that were prepared for publication and submitted to the Respondent Institute in this letter and which this witness undertook to answer and comment upon and analyze. It is tied in with his previous testimony, Your Honor.

It constitutes a censorship, if you please, of a publication that was submitted to Respondent Institute for the purpose of having it censored and criticized and that criticism is made by this witness in exhibit 2892-A and B in the course of his criticism he harks back to a situation existing in 1929 about which he has testified, but he does not refer to some other things about which he has testified that followed the condition of 1929 to which he

17324 refers and to which his statement would have no application as mentioned here.

Mr. Wooden: And the particular in which it was chiefly asked to be changed was that statement of McGill "That in 1930 through 1933 the efforts of manufacturers to exert a greater control over production brought results," and the witness comments on that and explains it by reason of reference to this physical stock-house limitation that existed in 1929.

17325 Trial Examiner Norwood: That statement of fact, there, that is made by this third party here who is not here to be cross-examined on it—

Mr. Wooden: But Respondents acted upon those; took an action and wrote a letter about it, and it is with reference to their letter in the person of the witness that makes this other material submitted to the Institute for the purpose of having comment made upon it, makes the whole thing competent and admissible and relevant.

17337 Q. I note in Commission's Exhibit 2892-B, for identification, Mr. Mallory, the reference in the last paragraph to this 82 per cent figure that I mentioned to you yesterday where you say "the practical capacity is about 82 per cent of the maximum due to shut-downs for repairs and other reasons."

17338 Mr. Leisure: I object to the last question, Your Honor. Counsel read from the exhibit which is not in evidence and I don't think that should be done.

Mr. Wooden: All right.

By Mr. Wooden:

Q. Was the meaning of your testimony yesterday, Mr. Mallory, regarding the 82 per cent figure that we talked about that the practical capacity was about 82 per cent of the maximum capacity due to shut-downs for repairs and other reasons?

A. Yesterday I did not express myself as I should. I misused the word "capacity."

As I see it, if a plant has a capacity based on three months' continuous operation, its three highest months, and an estimate is made on that basis, I cannot see why the plant doesn't have the same capacity for the other nine months. That capacity should exist.

What I meant to imply was that due to the seasonable conditions of the business, the lack of orders, repairs, and other things that the production would be, say, 85
17339 per cent, and by that I meant 85 per cent of the Bureau of Mines rating based on their estimates of cement capacity. Based on my estimates of clinker capacity I would say, as I did yesterday, it would be 90 per, per cent of the production; not capacity.

17340 Q. Is the practical capacity about 82 percent of the maximum capacity due to shut downs for repairs, and other reasons?

A. I would say the practical capacity is the same the years around. The production, due to these facts I have just cited, is less.

Mr. Wooden: Your Honor, I submit that is an additional ground on which to receive Exhibit 2892-A and B because it contains a statement that is at variance with the witness' statement just made.

17341 Q. Did you, Mr. Mallory, make a statement in Exhibit, for identification 2892-A and 2892-B that the practical capacity is about 82 percent of the maximum capacity due to shut downs for repairs and other reasons?

A. I did, but I used the wrong word in using the word "capacity." I should have said "production."

Mr. Wooden: I submit, Yuor Honor, that the exhibit has another reason for its admission.

17342 Q. I am showing you papers marked for identification as Commission's Exhibits 2893 and 2894. Will you state what they are, Mr. Mallory, if you know (handing documents to the witness)?

A. 2893 shows the clinker capacity of each of the 12 districts; clinker production for the previous 12 months; the percent of clinker production; total amount of shipments for the previous 12 months, and those percents.

Q. Whose authorship is that paper?

A. I didn't get that.

Q. Who is the author of that paper, if you know?

A. Originally, myself. It is made, now, by my assistant.

Q. Was that paper distributed to the members of The Cement Institute?

A. It was distributed at that time, yes.

Q. This was in 1936.

And how about 2894; does the same statement apply to that?

A. They went out together, I think. Yes, they went out together.

17344 *Examination on the Voir Dire by Mr. Leisure.*

Q. Mr. Mallory, do I understand that Commission's Exhibits 2893 and 2894, for identification, were prepared by either you or your assistant?

A. Right.

Q. And you sent it out in the regular course?

A. Right.

Mr. Leisure: I have no objection.

Mr. Zimmerman: No objection.

Trial Examiner Norwood: Received as marked.

(COM. EX. 2893 and 2894 were offered and re-
17345 received in evidence.)

17346 Q. Mr. Mallory, showing you papers marked for identification as Commission's Exhibits 2895-A to 2895-D, do those papers represent compilations and computations that were made by you or in your office?

A. I made those.

Q. And distributed to the members of the Institute?

A. They were not distributed to the members of the Institute. It was a study I made and talked with two or three of my friends, and, as far as I know, they were not distributed.

Q. Did you show them to some members in the Institute?

A. I think I did; one or two.

Q. Did you seek their advice as to whether they should be distributed?

A. I think I did; yes, sir.

Q. Can you say whose handwriting appears down in the lefthand margin of those papers?

A. I can't say, positively, but it looks like my secretary, but I am not positive.

Q. Look at the handwriting on the bottom of the page of Commission's Exhibit 2895-D. Can you say whose that is?

A. That is a part of the same study.

17347 Q. Yes, but the handwriting?

A. I think it is the same as the other.

Q. You think it is your secretary's?

A. I think so, yes.

Q. Can you say why it was decided not to distribute this?

A. I think with whom I had the talk, the persons with whom I talked, I talked with one or two as I recall, it was not advisable to do it.

Q. I am asking you why it wasn't advisable.

A. I don't know why they said.

Q. Whom did you talk with?

A. May I look at that again?

Q. Yes. (Handing document to the witness.)

A. That would be 1934 that that was issued. I don't remember with whom I talked.

Q. Did you talk to some officials of the Institute?

A. I think it was some of the members.

Q. Were the ones with whom you talked, were they officials of the Institute?

A. I think not.

Q. And you can't remember a single one with whom you talked?

A. I wouldn't be sure.

Q. What is your best recollection?

A. I have no recollection as to any particular person.

Q. What was the purpose in preparing the study?

17348 A. It was a study that I made showing the percent of shipments of clinker capacity made by the different companies for these years, from 1925 to 1933.

Q. And for what purpose?

A. A study that I made because I thought it was interesting and might have some value.

Trial Examer Norwood: Do you remember any of the criticisms?

The Witness: I think I was told they thought it would not be wise to go ahead with it.

Trial Examiner Norwood: For what reason?

The Witness: What the reasons were, I cannot tell.

Trial Examiner Norwood: You abandoned it without knowing just why it shouldn't be circulated?

The Witness: I took the judgment of those to whom I talked and the study was made for my own information and then after it was completed I talked with perhaps two or three; I don't remember who they were.

By Mr. Wooden:

Q. Did you have anyone in the Institute with whom you ordinarily consulted about matters that you were in doubt about?

A. No, as far as the statistic department was concerned, I was in charge of that and used my own judgment in whatever was done.

17349 Q. If that is so, why didn't you revise some of these rated capacities for mills that you yourself say you thought were unfair?

17350 A. Because in the formula that I use I can only use the historical clinker production to make my estimates, and until the plants where it was unfair—until they produced, actually produced, a larger amount of clinker production during any three months, I could not change the estimate that I made.

Q. You had no power, individually, to change a situation that you thought was unfair?

A. No,—not under the formula that I was using.

17354 Trial Examiner Norwood: Mr. Witness, this is a study that you made?

The Witness: Right.

Trial Examiner Norwood: From information that came to you as a statistician?

The Witness: Right.

Trial Examiner Norwood: Can you testify to the correctness of these papers?

The Witness: As far as I know, they are correct.

Trial Examiner Norwood: And they are statements as to the percentages and production and so on?

The Witness: Yes, so far as I know, they are right.

17355 (COM. EX. 2895-A, 2895-B, 2895-C, and 2895-D was offered and received in evidence.)

Q. Is it a fact, Mr. Mallory, that such companies as Marquette, Huron, and Aetna, had a percentage of production that ran above the average of production in their respective districts?

A. May I look at the sheets?

17356 The Witness: This paper shows shipments; not production.

Trial Examiner Norwood: Well, the objection is overruled.

By Mr. Wooden:

Q. But the ratio of shipments to capacity,—it also shows that?

A. It shows shipment—

17357 Q. Did Marquette, in the district covering eastern Missouri, Iowa, Minnesota, and South Dakota, for instance in 1929, ship 91.6 as against the district percentage of 69.3?

A. That is what the figures show.

Q. Is there a similar, although smaller, disparity between the district averages and the Marquette averages for succeeding years?

Mr. Zimmerman: Well, now, you are asking what these documents show?

Mr. Wooden: I am asking him for some help in interpreting the documents.

A. Yes.

17358 Mr. Zimmerman: Ah, yes, maybe "yes," maybe "no." If it is in the document then the document speaks for itself.

Trial examiner Norwood: Yes.

Mr. Zimmerman: It is all there and we do not have to emphasize that.

17359 Trial Examiner Norwood: Does it appear on the paper, Mr. Witness?

The Witness: Yes.

Trial Examiner Norwood: Objection sustained.

Mr. Wooden: Your Honor, I would offer for the rec-

ord at this time a document previously marked for identification as 821-WW to ZZ, inclusive, being photostats of an original letter from H. Struckman, president of International Cement Corporation, to G. F. Coffin, Treasurer of Nazareth Company, dated August 30, 1933, and being one of the documents produced under the subpoena duces tecum last year.

Mr. Zimmerman: I would like to ask a question. This is for the record. On 2895 as on the voir dire
17360 because I think it may be—

Mr. Wooden: The witness has no relation to the—

Trial Examiner Norwood: That is already in evidence.

Mr. Zimmerman: I know it is.

Trial Examiner Norwood: And I will tell you, Counsel, you may ask him at the time you are cross-examining him, and then move to withdraw it if anything appears.

Mr. Zimmerman: Well, it would only take a moment.

Trial Examiner Norwood: I know.

Mr. Zimmerman: Just one question is all I want to ask. You don't mind me asking one question?

Mr. Wooden: No, I don't.

Trial Examiner Norwood: Go ahead.

*Examination On the Voir Dire y Mr. Zimmerman.*

Q. As to whether or not the information which is represented by the figures on this exhibit 2895 was furnished by the industry members, who sent it to you, or did you get it from the Bureau of Mines?

A. Part of it came from the Bureau of Mines and the rest of it came from the individual members.

Mr. Zimmerman: Now, as to anything that came from the individual members, Your Honor, I want to note an objection for the record to the admission of that
17361 document on the grounds that that was confidential and that this is confidential information and should not be enclosed or made public. It doesn't serve any good purpose in this case and there are grave reasons why it should not be made public.

Trial Examiner Norwood: Well, it is unnecessary to rule on that because the paper is already in evidence.

Mr. Zimmerman: But that objection had not been made because I hadn't had the opportunity to bring out that fact.

Mr. MacIntyre: The record shows this information had already been shown to and discussed with other members of the industry. I don't know how confidential information is after he had discussed it with the industry.

Trial Examiner Norwood: The objection will be overruled. Go ahead.

17363 Mr. Wooden: 821-WW to 821-ZZ. Those are the ones I offered last (handing documents to the Examiner).

Trial Examiner Norwood: The writer of this letter is —whose signature is that?

Mr. Wooden: Mr. Struckman, the president of the organization.

Trial Examiner Norwood: President of what?

Mr. Wooden: The International Cement Corporation.

Trial Examiner Norwood: Writing to a Respondent?

Mr. Wooden: Yes, and, I believe, subject to check, the party written to was president of the Institute at that time.

Mr. Leisure: We pointed out there has been no basis laid for offering the letter in evidence. It is incompetent, irrelevant, and immaterial—

Trial Examiner Norwood: Is there any testimony that he replied confirming or approving this, or that there is any testimony on it?

Mr. Wooden: I am not aware that there is a reply on it at this moment. I am offering it on the ground that the party writing it as a member—of a Respondent

17364 member of the Institute—is responsible for what he wrote, at any rate.

Mr. MacIntyre: And, if Your Honor please, that member of the Institute is a Respondent in this case.

Trial Examiner Norwood: You mean the writer?

Mr. MacIntyre: Yes. The International Cement Corporation, then known as the Cement Corporation, is now known as the Lone Star Corporation. It is in the complaint as a party under the name "International Cement Corporation" but by a stipulation which is now an exhibit in this record it is stipulated that it may be taken as if it appeared in the complaint as a party, Lone Star Corporation.

(COM. EX. 821-WW, 821-XX, 821-YY, and 821-ZZ was offered and received in evidence.)

17365 Q. Showing you papers marked for identification 821-EE and FF and GG, Mr. Mallory, were you the author and writer of those papers (handing documents to the witness)?

A. That is right, yes.

Q. Was Mr. Coffin, to whom this was addressed, president of the Institute at that time?

A. I do not remember.

Mr. Wooden: I offer in evidence Commission's Exhibits 821-EE, FF, and GG.

Mr. Leisure: This exhibit seems to be a letter written by the witness on November 15, 1933. Now I submit that until there is some showing that it had some connection with the other Respondents or that they authorized it in some way; that it is not binding on them.

Not every act or every letter that this witness wrote is binding on all the Respondents, and if it be received I ask it be confined in some way. It can't be binding on all the Respondents.

Trial Examiner Norwood: Was he statistician of the Institute at that time?

Mr. Wooden: Yes, Your Honor.

17366 (COM. EX. 821-EE, 821-FF, and 821-GG was offered and received in evidence.)

Q. Mr. Mallory, can you say why in Exhibit 821-EE to GG, inclusive, you analyzed the effect of the pro-
17367 posed allocation plan upon the Cape Girardeaux plant and the Huron Company (handing document to the witness)?

A. I presume Mr. Coffin may have asked me. There was—

Q. Can't you give us your recollection rather than your presumption? We might take both but we prefer the recollection first, anyway.

A. Until I read this, I had no recollection of the thing.

17368 A. The best of my recollection is that this was in reply to some inquiry made by Mr. Coffin, and upon the basis of such request I made an analysis along the line that he asked.

By Mr. Wooden:

Q. Do you mean by that, Mr. Coffin requested you to analyze the effect of the proposed allocation upon the business of Marquette and Huron?

A. The reason—I do not recall, of course, but I assume that the reason that those two companies were picked out was because of the request made by the—

Q. Well, Mr. Coffin's concern or company was not interested in selling or shipping into the same territory that Marquette's Cape Girardeaux mill or Huron was shipping into, or was it?

A. No, but Mr. Coffin was a member of the committee that was considering the allocation plan.

17369 Q. As to Huron, you volunteered that about Huron in a postscript on 821-GG.

A. Apparently I did, but you notice that this is an estimate that I made without any knowledge as to their distribution and shipments.

Q. Why did you assume that Mr. Coffin would be interested in the effect on the Huron Company?

A. Because Huron shipped into the same district into which Nazareth is shipping or competing.

By Mr. Wooden:

Q. But that is not true as to the Cape Girardeaux plant of the—

A. No.

Q. Marquette?

A. No.

17370 Q. Hadn't those two companies been shipping a larger proportion of their capacity than the other companies?

A. I don't get that question quite clearly. What other companies?

Trial Examiner Norwood: Read it.

(Question read.)

A. What other companies?

By Mr. Wooden:

Q. Hadn't they been shipping a larger proportion of their capacity than some of the chain companies?

A. My recollection is they have.

Q. You mean they were, at that time?

A. Correct; thank you.

Q. Is the document I show you marked 821-JJ and KK, for identification; are you the author of that document (handing documents to the witness)?

A. Yes, I wrote that.

17371 (COM. EX. No. 821-JJ and 821-KK was offered and received in evidence.)

17372 Q. Mr. Mallory, referring to this statement in the first paragraph of your letter, Exhibit 821-JJ, you quote from Mr. Coffin's, in which Mr. Coffin says:

"'It is mighty unfortunate there are so few people in the industry who accept your figures on production as accurate.''

"Do you have anything further to say on that point other than what you have said, immediately, in the question?

A. Well, the only knowledge that I have is what Mr. Coffin says. What his reasons were for making that statement, I don't know.

By Mr. Wooden:

Q. Do you have any knowledge from any other source that there were only a few people in the industry who accepted your figures on production as accurate?

A. We make mistakes sometimes in our reports and we are called down when we do, but whether there is—at that time, see, that was the time of the N.R.A.

Q. Yes.

A. As I recall that letter was written to him as chairman, I think he was chairman, first chairman of the
17373 committee, to work out the plan of allocation, and I collected data on that quite, made quite a number of investigations for him, but why he should refer there to production, I do not know.

Q. Is it possible that some companies reporting their production to you might not have reported correctly?

A. Of course it is possible, but every month I check with the Bureau of Mines and they are reasonably close.

Q. Well, do you—

Trial Examiner Norwood: The same companies report to the Bureau of Mines, do they not?

The Witness: Yes, in each district.

By Mr. Wooden:

Q. Do you have access to Bureau of Mines reports for each particular company?

A. Not now. There was a time when I did.

Q. When was that?

A. I think from about 1925 up to about 1930.

Q. Here in 1933 you were saying that you checked with the monthly statement issued by the Bureau?

A. Right.

Q. You say in this exhibit 821-JJ that you omitted the shipments of certain companies in order to learn the results of the operations of the companies who are more inclined to cooperate for the common good. What few companies were there that you omitted for that reason?

17374 A. I have no recollection of what companies they were.

By Mr. Wooden:

Q. Do you have any recollection as to wherein they had been disinclined to cooperate for the common good?

A. No, I have not.

Q. Wasn't it with reference to their degree of production and shipments?

A. I do not remember.

Q. What do you mean by this paragraph in Exhibit 821-JJ referring to districts being out of balance with other districts.

A. May I look at that a moment?

(Thereupon the document was handed to the witness.)

A. I don't find that. Oh, here.

Mr. Zimmerman: While the witness is looking at that, what is the date of that?

17375 Mr. Wooden: November 15, 1933.

A. I apparently meant that in some districts the—

By Mr. Wooden:

Q. Did I say "out of line"? I should have said "out of balance."

A. That in some districts, the shipments were greater, in some districts they were less, and the "out of balance" would be the difference between the two.

Q. Well, you don't mean to say that the shipments of each district should be the same, do you?

A. No, I do not.

17376 Q. Well, then what do you mean by them being out of balance?

A. I am trying to recall, Mr. Wooden, a tabulation that I made that showed the out-of-balance figures in each district.

Q. Yes, but aside from those details—

A. Yes.

Q. —I want to get an understanding of what this language "out-of-balance" means.

A. As best I can recall—does that cover the nine districts?

Q. No, you illustrate it by districts 1 and 2.

A. Don't I, down below—

Q. You give other districts. Yes, there are nine—whether there are nine, or not, I don't know.

A. Yes; there are nine districts.

My recollection is that I took the capacity, the clinker capacity of each district, and I figured the percent of shipments probably in each district and some districts shipped a larger percentage and others a small percent, and those two were totaled, and the out-of-balance would be the difference.

Q. Do you mean that the out-of-balance would be represented by the amount that one district shipped into another district?

A. No, I don't mean that.

Q. Or the net difference between the amounts shipped by one district into another?

A. No. May I make this plain?

17377 Q. It is not plain to me.

A. All right; I will try to.

In all my calculations I do not use shipments as they are generally used. I use consumption and consumption means shipments into States so that when I speak of shipments or when I write about shipments it refers to shipments within the State of each district; no cross-shipments.

Q. Let us try to get a little closer to it. Take, for illustration, your figure—well, let us take this district composed of Wisconsin, Illinois, Indiana, and Kentucky.

A. Yes.

Q. "Total plants in the district, 11. Number of plants, in this calculation, 10. Out-of-balance, 12.2 per cent."

A. Right, but—

Q. Just explain what that 12.2 percent means.

A. As I recall, that 12.2 percent shows that they shipped in that district probably due to a larger demand in district —that is 1933, is it not?

Q. Yes.

A. Yes. At that time the pavement demand in that district was very heavy and they shipped a larger percent of clinker capacity due to a larger demand which probably

was due to pavement and other districts would ship a smaller percent.

Q. You mean it was out of balance between—out of balance by the amount of 12.2 percent compared to what?

A. What I mean—let me put it this way: These 17378 are not definite figures. One district may have ——— have shipped 52 percent of its capacity, and the balance was what I called out of balance.

Q. The difference, you mean?

A. The difference, yes.

Q. I see. In other words, if the mills in Wisconsin, Illinois, Indiana, and Kentucky shipped 12.2 percent more than another district, for instance, they were out of balance to that extent?

A. No. It means that the consumption —the word "shipment" is wrong. The consumption in that district, we will say, was 12 percent more than the average, perhaps.

Q. Then the consumption was 12 percent out of balance, so to speak?

A. Out of balance, I would say, more.

Q. That consumption was measured by the shipments, was it not?

A. Well, the consumption is the shipments into the States of a district; not outside of a State.

Q. Yes. In other words, the consumption in that district is measured by the shipments into it?

A. Into that district; right.

17279 Q. When you refer to shipments into a district do you include in it shipments made by mills outside that district as well as mills within that district?

A. We are talking about district 5. I can illustrate that better by saying that in northern Illinois a considerable portion of the cement that is consumed in Illinois comes from the northern Illinois mills.

That for the southern part comes from the mills on the west bank of the Mississippi; Hannibal, St. Louis, and Cape Girardeaux, so independent of the source of shipment, it is the destination that the consumption covers.

Q. Have you continued to prepare and distribute statistics which show the extent to which shipments in various districts are out of balance?

A. No, because that was prepared for the allocation committee.

Q. Have you continued to prepare and distribute statistics which show the net amount shipped into various districts from other districts?

A. I don't need to do that. The Bureau of Mines does that.

Q. But do you put that out in any way?

A. No, except I use them in my totals. As I said a while ago, when I refer to shipments I always
17380 should say consumption. I don't always do that.

Q. Showing you a paper marked 808-HHH, were you the author of that paper?

A. Yes, I was.

Q. The signature to it, was that in your writing, or—

A. No, that was my secretary.

17381 *Examination on Voir Dire by Mr. Leisure.*

Q. Will you refer to the second paragraph of the exhibit, Mr. Mallory, please, and tell us whether there was any quota as described in the first part of that paragraph?

A. Mr. McKelvy was an active member of the committee on allocation and this reference that I make to plant 358 was assuming that the allocation plan might go into effect.

Q. It was purely—

A. But there was no quota.

Q. There was no quota?

A. No quota.

Mr. Leisure: That reference to quota was purely hypothetical.

Trial Examiner Norwood: You mean proposed quota.

17382 (COM. EX. 808-HHH was offered and received in evidence.)

17383 Q. What was this plant 358 that you stated exceeded its quota there by 50 percent in 1931?

A. Cape Girardeaux, I think. I will tell you in just a moment.

Q. Is that the Marquette plant of Cape Girardeaux?

A. Yes. May I refer to this?

Q. Yes.

A. Right, Cape Girardeaux.

17384 Q. Now, here again, Mr. Mallon, in this Exhibit HHH you refer to this matter of "out of balance."

You say, "In 1933 the excess barrelage shipped by plant 358 represented 80 percent of the total number of barrels that were out of balance. Do you mean by that expression the same as you explained before?

A. I assume in that case that what I meant was you take the average of the districts, that 358 was that much over the average of the district.

17385 Washington, D. C.,
March 9, 1939.

17391 W. S. MALLORY thereupon resumed the stand and testified further as follows:

*Direct Examination by Mr. Wooden (Continued).*

Q. Mr. Mallory, has there been more or less contention and dispute over the rated capacities that you
17392 assigned to different mills?

A. You mean my estimates of capacity?

Q. Yes.

A. As I stated yesterday, the estimates of capacity based on clinker production which I have made was
17393 not satisfactory to the mills who have not had a chance to run full capacity.

By Mr. Wooden:

Q. Well, has there been at times, strong urgings on their part that they be given a higher capacity rating?

A. It has been suggested to me, but as I also explained yesterday I had no power, no authority, nor would I, myself, change anything from the historical, actual production, because my formula was based on that and the moment I opened the door and made any changes whatever the whole formula would blow up.

Q. Well, did various mills urge you strongly at times to give them higher ratings?

A. No, they simply objected, and I said, "I cannot make any changes except from the historical production."

Q. Did they object because their ratings were too low, in their opinion?

A. They thought so.

Q. Yes.

A. And, I might add, I think in some cases they were right.

Q. What was the formula that you referred to?

A. As I told you yesterday, based on the three highest consecutive months of actual clinker production.

17394 Q. Have you been present at any meetings where mills urged that they be given higher rated capacity?

A. I have not.

Q. How did it come to you?

A. Individually.

Q. And orally?

A. Orally—as I remember.

Q. Who originated the idea of taking the three highest consecutive production months as the basis of rated capacity?

A. I did.

Q. Did you have any consultation with others about it, before you decided on it?

A. I made an analysis back in 1925 in which I used one month, two months, three months, four months, five months, six months.

I worked out a number of—I worked out the results on each basis, and then I consulted with some of the practical men in the industry as to what period a plant could run continuously without its production being interfered with by repairs and other changes.

Q. Who were some of the parties that you consulted with,—the practical men, you say?

17395 A. That is so long ago that I do not remember.

Q. You do not remember a single one?

A. I do not.

Q. Can you say whether or not they—how many of them were there?

A. I would say, perhaps, two or three.

Q. Were they representatives of chain mills?

A. That I don't remember.

Q. You do not know what part of the country they were located in?

A. Probably in District 1, in the East where I was located at that time.

Q. Has it been your experience and observation that mills considered it of some importance to have as high a capacity rating by you as they could get?

A. May I have that question again?

Trial Examiner Norwood: Read it.

(Last question read.)

A. I do not understand it.

Trial Examiner Norwood: He means—

The Witness: May I ask what you mean by "some importance"?

By Mr. Wooden:

Q. Well, you will have to—

Trial Examiner Norwood: Was it considered de-

17396 sirable.

17398 A. Under the formula that I have used, the same method was used in working out the estimated capacity of the smallest mill, just exactly the same as the largest mill plant.

Trial Examiner Norwood: That does not answer the question.

Mr. Wooden: No.

The Witness: Then I do not understand it.

Trial Examiner Norwood: Do you understand whether the mills desired to have—or do you have any reactions from them that indicate that they desired a large capacity rating rather than a small one?

The Witness: The only—the objections that I have had on my estimates I have already indicated.

Trial Examiner Norwood: Yes.

The Witness: The mills—the plants I should say—that operated in the time of large demand, as I recall, have not questioned my estimates.

By Mr. Wooden:

17399 Q. Well, would you not think, Mr. Mallory, that those mills that made those objections indicated to you a desire to have a higher capacity rating than they were given?

Mr. Zimmerman: May the Examiner please, I object to this persistence in a matter that has been gone into with such great detail that it is an utter waste of time to—

Trial Examiner Norwood: I am going to let him—

Mr. Zimmerman (Continuing) —to persist—

Trial Examiner Norwood: I am going to let him continue until they get a direct answer to this question.

Mr. Zimmerman: Well, I should like to finish my statement if the Examiner please.

Trial Examiner Norwood: The objection is overruled.
Mr. Zimmerman: I have not finished—
Trial Examiner Norwood: You may not finish.
The objection is overruled.
Mr. Zimmerman: Well, all right, off the record then.
Trial Examiner Norwood: He is trying to get a direct answer from this witness, and I hope that Counsel will not interrupt until he completes his answer.
Mr. Zimmerman: I am not interrupting.

17400 This witness has explained in detail that what these mills asked for was to have what they thought was the actual figure used for their production capacity, and he said that in some instances they thought it ought to be higher, and he was not sure but what they were right, but according to his formula that he had worked out he had to use a different method than they did.

Trial Examiner Norwood: Yes.
Mr. Zimmerman: That has all been gone into and explained thoroughly.

17401 Trial Examiner Norwood: Read the question to the witness and permit him to answer it.
(Question read.)
Mr. Zimmerman: There isn't any reason why this witness—
Trial Examiner Norwood: Well, off the record.
(There was further discussion off the record.)
Trial Examiner Norwood: On the record again.
The Witness: May I have the question again?
Trial Examiner Norwood: Read the question.
(Last question re-read by the Reporter.)
A. The mills that objected—or the companies that objected to their plants' rating, believed that their capacity was larger than the estimate that I made.

By Mr. Wooden:

Q. Do you see wherein it was of any importance to a mill whether it had a higher rating of capacity than you had given it?
Mr. Leisure: One moment, please.
I submit that whether this witness says it or does not say it is not binding upon any of the Respondents in this case.
Trial Examiner Norwood: Read that question.
(Last question read by the Reporter.)
Mr. Wooden: Your Honor, this witness has been

17402 dealing with the subject of rated capacities for years,—has been dealing with the mills who objected to his ratings for them,—and it seems to me, surely, that I can ask him wherein that matter is of any importance to the mills so far as he can determine.

Mr. Leisure: That being so, Counsel can ask him any facts pertaining to his experience but he cannot argue with the witness.

Trial Examiner Norwood: No. I don't think you should do that.

Objection sustained.

By Mr. Wooden:

Q. Mr. Mallory, in your experience in dealing with this subject and of dealing with mills that objected to your rated capacity as to their mills, have you learned wherein it was important to them to have their rated capacities higher than you had given them?

A. I have not.

Q. Do you have any opinion based upon your experience as to why it was important?

Mr. Leisure: Now, I object to that.

Trial Examiner Norwood: Sustained.

The witness: You say I should answer it?

Trial Examiner Norwood: No, don't answer.

By Mr. Wooden:

17403 Q. Have members of the industry or representatives of the industry used your rated capacities in public statements or before public bodies as showing the actual capacity of the industry?

A. I do not know.

Q. Have they used it to show a capacity per annum of 260 million barrels?

A. I did not get that. I am sorry.

Mr. Wooden: Read it.

(Question read.)

A. I do not know.

By Mr. Wooden:

Q. Showing you papers bearing the identification mark 585-F and G, do you recognize any of the figures as to capacity and percentages shown on either of those pages (handing documents to the witness)?

Mr. Leisure: If Your Honor pleases, I don't like to

keep interrupting, but I don't think the examination is proper. The exhibit is not in evidence and I don't think the witness should be asked questions about it. If it is something to refresh his recollection, that is one thing.

Trial Examiner Norwood: He shouldn't ask him anything except to identify the paper.

Has it been marked for identification?

17404 Mr. Wooden: Yes.

Trial Examiner Norwood: What is it?

Mr. Wooden: 585-F and G.

The Witness: May I have the question?

Trial Examiner Norwood: The objection is sustained.

The Witness: Oh, I am sorry.

Mr. Wooden: I will offer 585-F and G at this time, it being a copy of a letter produced under subpoena, a letter to Mr. Charles F. Conn, president of the Institute, from the San Antonio Portland Cement Company, under date of March 6, 1934 (handing documents to Mr. Leisure).

Trial Examiner Norwood: Any objection?

Mr. Zimmerman: May I ask if there is any other foundation laid for it other than the fact that it was produced under the subpoena?

Mr. Wooden: That is the only ground of identification I have to offer.

I am, at the same time of offering, asking that further identification be waived.

Mr. Leisure: If Your Honor please, without taking time to read the document, it being from a non-respondent and someone we have no connection with, I, of course, object to the exhibit.

Mr. MacIntyre: At that time the writer of the letter was a member of The Cement Institute. It was written to

17405 the president of The Cement Institute who was also president of one of the Respondents here.

The record shows Mr. Conn was president of The Cement Institute during 1934, and it also shows he was president of the Giant Portland Cement Company, who was a respondent, and there is a document in the record showing the San Antonio Portland Cement Company was a member of The Cement Institute during 1934.

Mr. Leisure: The letter not having been written by a Respondent, we having no contact with the author of the letter, no opportunity to examine the author as to whether he wrote the letter or not, whether it is truthful or not;

being deprived wholly of cross-examination, we object to the document as being incompetent, irrelevant, and immaterial; no proper foundation having been laid whatever for its admission in evidence.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead. Back on the record.

Mr. MacIntyre: If Your Honor please, on the point Mr. Leisure made that he has no opportunity to check this document, he is at this hearing representing Mr. Conn in more than one capacity. Mr. Conn is an officer of The Cement Institute, and he is the chief executive officer
17406 of one of the Respondents, and the original letter, apparently is in Mr. Conn's possession at this time.

Trial Examiner Norwood: This is a letter to Mr. Conn. He didn't write this letter.

Mr. MacIntyre: No, but we are talking about the checking of the original letter. The original letter is apparently yet in Mr. Conn's possession and Mr. Leisure is representing Mr. Conn.

Mr. Zimmerman: There isn't any showing this letter was ever sent or received.

Mr. MacIntyre: That is in Mr. Leisure's power to check.

Mr. Zimmerman: We are not bound to excuse the laying of the ordinary foundation for admission of documents in evidence. There should be some proof that they were written or sent or received.

(COM. EX. 585-F and 585-G, was offered and received in evidence.)

Mr. Zimmerman: I am not sure, if the Examiner please, that the record shows my statement was in the na-
17407 ture of an objection. May I have the liberty of restating that?

Trial Examiner Norwood: Certainly.

Mr. Zimmerman: That there is no foundation that has been laid for the proper identification of the Exhibit 585-F and G.

The record does not show that the document was ever written by any particular person; that it was ever deposited in the mails or sent by messenger to any particular person or ever received by any particular person, and there is no connection between it and any Respondent that has thus far been established in the record, and for all of those

several reasons, without regard to its content which I don't know because I haven't seen it, I object to it.

Trial Examiner Norwood: I am receiving this on the statement of Counsel that it was produced by the Institute from their files.

Mr. Zimmerman: He hasn't said that. He has said by some one of the Respondents upon whom a subpoena duces tecum was served. Isn't that so?

Trial Examiner Norwood: That feature of it is subject to check.

If Counsel can show me it wasn't found in the files of the Respondent, or the Institute, I shall entertain a mo-
17408 tion to withdraw it.

Mr. MacIntyre: One further statement on that point, if Your Honor please: At the time this letter was written during 1934 Mr. Charles Baumbarger, official of the San Antonio Portland Cement Company, and apparently the writer of this letter because it bears his initials, was a trustee of the Cement Institute for District 9.

We have other documents in the record that clearly show that.

Here is a letter produced by one of the Respondents addressed to the President of the Cement Institute and bearing on its face and showing that it was from a trustee of the Cement Institute to the president.

It seems that that is sufficient to meet any objection or any point made by Mr. Leisure that if is by a third party.

A trustee of the Cement Institute is one of its Board of Directors.

Mr. Leisure: I don't think we need to reply. Mr. MacIntyre's statements, of course, are not testimony.

Trial Examiner Norwood: I am receiving this, as I say, subject to check.

Mr. Zimmerman: Your Honor will observe that re-
gardless of the statements made by Counsel for the
17409 Commission it does not appear that the letter was signed by anybody.

Mr. Wooden: It is not an original letter, if that is what you mean.

Mr. Zimmerman: I don't know. All I am looking at is what you have offered in evidence, and there is no signature on that document.

Trial Examiner Norwood: I am admitting it subject to check as to the files it came from, and so forth, and will

entertain a motion to withdraw it and in case it is withdrawn the testimony in regard to it will be struck.

I think that is the best way to do it.

By Mr. Wooden:

Q. Mr. Mallory, do you have here with you the rated capacity of any mills?

A. I do not.

Q. Do you have any figures that show percentages of particular mills to total capacity?

A. I do not.

Q. Showing you Exhibits 585-F and G, do you recognize any of the capacity figures shown in this document?

A. I have never seen this letter. May I read it?

Q. Surely. I couldn't expect you to answer otherwise.

(The witness reads documents.)

17410 A. No, I have never seen those figures before.

Q. And they don't correspond even approximately to any figures that you remember as to the capacity of these mills?

A. They do not.

If you will note, he says here that these are approximate capacities and, evidently, what has happened, he has figured the total and figured the percentages out for himself.

Q. Were you aware during 1934 of an objection by the San Antonio Portland Cement Company to its rated capacity, the rated capacity that you had for it?

17413 A. I think I answered that I have an indistinct recollection that they did.

By Mr. Wooden:

Q. Yes.

Did information ever come to you that the other Texas companies were willing to have the rating of the San Antonio Company increased?

A. No such—

17414 A. No such information ever came to me.

By Mr. Wooden:

Q. Were the ratings of the Texas companies changed following March, 1934?

A. If any of the Texas Company plants—may I make this distinction now—a company is not rated; it is a plant that is rated.

Q. Yes. Thank you. All right.

A. If any of the Texas plants increased the total amount of their clinker production for any three consecutive months, my estimate of their capacity was increased the first of the following year.

That has been the custom since 1925.

Q. Yes.

Well, I am asking you whether or not, as a matter of fact, any changes were made in the rating of the Texas plants following March, 1934?

A. That I cannot answer from memory.

Q. Can you say whether or not you would allow an increase in rated capacity if all the companies immediately affected were agreeable to it?

17415 A. I would not.

17416 Q. Mr. Mallory, referring to Exhibit, for identification, Commission's 2892-B, and the figure of 82 per cent of the maximum capacity that I asked you about yesterday, as mentioned therein—was there a time when 85 per cent was used instead of 82 per cent?

A. May I see the letter?

Q. Yes.

(Witness refers to paper.)

A. Oh, this is the same letter that I saw yesterday.

Q. Yes, you saw it yesterday.

A. Eighty-five per cent was purely my estimate of the cement production of the cement capacity. Since yesterday I have looked up the Bureau of Mines' records, and I find that there are eight or nine districts that actually produce in a year 90 per cent, 88, 90, 91, 92 per cent.

17419 Q. My whole question was, Mr. Mallory, as to whether there was a time when 85 per cent was used instead of 82 per cent.

Mr. Leisure: For what purpose, please.

Trial Examiner Norwood: Answer that question.

Mr. Leisure: Could we find for what purpose?

Mr. Wooden: For the same purpose the 82 per cent was used for, and which he has testified about quote at length.

Trial Examiner Norwood: Go ahead.

The Witness: May I have the question again?

(Question read.)

A. I have used as an estimate, at times, 82 per cent and 85 per cent as representing the per cent that produc-

tion was of my rated capacity. If I had taken the trouble, however, to look up the past records I would have made both percentages much higher:

17420 By Mr. Wooden:

Q. What was the period of time that 85 per cent was used?

A. That I cannot answer.

Q. Was it prior to the 82 per cent?

A. That I do not know.

Q. Has the 82 per cent figure been changed since it was used in 1935?

A. As I stated a moment ago, both 82 per cent and 85 per cent were my own estimates, used only by myself.

Q. That is not the question, Mr. Mallory. The question was, was 85 per cent used prior to 82 per cent or subsequent to it?

A. I already answered that, saying I do not know.

Q. Has 82 per cent been used since March, 1935?

A. That I do not know. You mean used by myself?

Q. Yes. Oh, yes.

A. That I do not know.

Q. What other percentages have been used that you can recall besides 82 and 85 per cent; any others?

A. I think I stated the other day that based on the clinker capacity, that it was my judgment or my experience, at least, that 90 per cent of—

Q. I am not asking for your judgment or experience, Mr. Mallory; I am asking you what you used.

17421 A. I, myself, have used 90 per cent.

By Mr. Wooden:

Q. When?

A. I can't give you the date.

Q. You used 90 per cent in the same way you used the 82 per cent mentioned in this letter?

A. Yes.

Q. Was it subsequent to your use of the 82 per cent?

A. I did not get that.

Q. Was it subsequent to the use of the 82 per cent?

A. I would say yes; I am not sure, however. I don't remember the date or time.

17422 Q. Did you consult with anyone before making your changes in those percentages?

A. I did not.

17423 Q. Were you aware, Mr. Mallory, referring to those pages, that the 85 per cent figure was being used at that time; the time of this—

Mr. Leisure: I object to that. That is merely an attempt to get into this record something that was in a previous record in the form of the question.

It hasn't the slightest relevancy to the issues in this case whether this witness was aware it was used way back in that period of time or not.

Trial Examiner Norwood: I think he may ask him that question; whether he was aware of its use on a certain date, or not, without the use of this court record.

Mr. Leisure: Yes, of course. I object to the use of the record in this manner.

17424 Trial Examiner Norwood: Did this witness identify that record in any way? Is it his testimony?

Mr. Wooden: No.

Mr. Leisure: I object to the question.

Mr. Wooden: I should have said the time more specifically; in other words, in 1916.

Mr. Leisure: I object to the question, Your Honor, standing in the record.

Trial Examiner Norwood: Objection sustained.

Mr. Wooden: Your Honor, I ask leave to read into the transcript here the pages of this printed record which I have referred to and which were numbered 2896-A to D, inclusive, without going through the formality of establishing the authenticity of this record and on the assumption that its authenticity will not be questioned.

I ask that leave in order to throw light upon this 85 per cent figure that the witness has testified about, and to show the discussion by representatives of companies which are now respondents in this proceeding about what that 85 per cent figure means.

I also offer to show by it that it is stated again and again, without qualification, that it applies to capacity and not to production, as the witness has changed his testimony to make it appear, and which is contradicted, also, by his own letter that I offered in evidence, but

17425 which was not received.

Mr. Wooden: You have not stated, Mr. Leisure, whether your objection is to the authenticity.

Mr. Leisure: No technical objection.

Mr. Wooden: No technical objection.

Mr. Leisure: Just that it is incompetent, irrele-
17426 vant and immaterial, and has nothing to do with the issues in this case; no proper basis laid for the testimony in any way.

17427 Trial Examiner Norwood: I shall have to determine its admissibility and relevancy, and I will take it into consideration and rule on it later. If it contains admissions of some of these Respondents here, I see no reason why it should come in, but I want to examine it and see.

Mr. Wooden: I want to say further, Your Honor, that the portions of that printed record that I offered contain statements by Mr. Lubar representing the Vulcanite Company, and Mr. Israel, representing the Coplay Company, both of whom are Respondents in the present pro-
17428 ceeding.

By Mr. Wooden:

Q. Mr. Mallory, has it been your experience that since 1930—

A. I did not hear that.

Q. Has it been your experience that since 1930 the production of cement has remained, for the most part, somewhat below the total of shipments for the same period?

A. Without looking at the figures, I would say that the production and shipments have been reasonably close during that period.

Q. During that period have not the shipments somewhat exceeded the production, so as to reduce the stock?

A. It is possible they have, in some districts.

17429 Q. Mr. Mallory, can you break down that nine-year period into any smaller periods, and give perhaps a more detailed answer to the question?

A. I know from my experience there are times when the demand in a given district is more than it may be in some other district, and it is possible to ship more in a year than is produced because the material is taken from stock; but I do not remember any detail, because over that period would represent how many years did you say, may I ask?

17430 Q. I said since 1930.

A. Yes, well, that is eight years—that is 96 months.

Q. Yes.

A. And there are nine districts.

Q. Yes.

A. That is merely 800 separate figures.

Q. Well, I did not want you to go into that much detail, I am sure.

A. No.

Q. But can you answer this question as to whether or not during that period, taking the industry as a whole, the stocks on hand have been gradually reduced?

A. Yes, they have.

Q. Yes, and during that period therefore, the production ran somewhat below the shipments, is that right?

A. That I could not answer without—

Q. Would not that follow from your previous answer?

A. Not necessarily because—

I am afraid I do not understand that question. May I have that again?

17431 Q. Was it that condition, or that relation, between production and shipments that you were discussing in Commission's Exhibit 2892-A and B, for identification?

17432 A. Can you show me where in the letter that is?

By Mr. Wooden:

Q. At the bottom of this first page and the top of the second.

17433 Mr. Wooden: Again, Your Honor, it seems to me that that answer makes the exhibit admissible, for an understanding of his testimony, and it is his own letter, and I again offer it in evidence.

17434 Mr. Leisure: In other words, Your Honor, if the witness on the witness stand now testified on some subject, he can offer such letter that has nothing to do with this case, in evidence.

Trial Examiner Norwood: Well, I think in view of all the subsequent discussion and testimony—

Mr. Wooden: This is his own letter.

Trial Examiner Norwood: I shall receive this as Commission's Exhibit—what is it?

Mr. Wooden: 2892-A and B.

(COM. EX. 2892-A and 2892-B was received in evidence.)

Mr. Leisure: May we have the other letter that is a

reply to it, so that we may study it and see whether we should offer that?

Trial Examiner Norwood: Yes.

Mr. Wooden: Yes, I offered it myself, and I will re-offer it at this time, Your Honor, because Commission's Exhibit 2892-A and B that was just received comments on
17435 this, and the chain of circumstances is complete, in that the McGill service writes the Institute asking them to look over certain things and make their criticisms. Mr. Mallory answers that for the Institute. He identified it as being a letter he wrote as the statistician for the Institute, and he comments in his letter about certain of these figures which are contained in the McGill service, and they are on that subject of the relation between shipments and production over a period of time.

Trial Examiner Norwood: I am receiving the Commission's Exhibit 2892-A and B only for the purpose of studying it in connection with this witness' testimony, and as to the other one, if Counsel has asked for it they may examine it, and if they want to introduce it, why, that is a different matter.

Mr. Wooden: I wish they would (handing document to Mr. Leisure).

I have offered it twice, and I think it ought to be
17436 admitted. Maybe if they will join me in the offer Your Honor would be willing to—

Trial Examiner Norwood: Answer that question?

was used for, and which he has testified about quate at

(Question.)

I have offered it twice, and I think it ought to be admitted. Maybe if they will join me in the offer Your Honor would be willing to—

17437 Q. Mr. Mallory, I am showing you a part of a printed volume being on page 707 of that volume and that volume being Volume 2, Transcript of the Record in the Cement Manufacturers Protective Association case as filed in the Supreme Court in October, 1924, and the portion on page 707 to which I refer has been marked for identification Commission's Exhibit 2897. Do you remember that as an exhibit in that case?

Mr. Zimmerman: You mean is this an exhibit that the witness had something to do with in that case?

Mr. Wooden: Yes.

A. I do not remember it.

By Mr. Wooden:

Q. Were you at one time chairman of the committee on statistics of an old Cement Association back in 1913?

A. I was chairman of the committee on statistics for the Portland Cement Association.

Q. What was the Eastern Association?

A. You mean the Protective Association?

Q. Well, what was the Eastern Cement Association?

Mr. Zimmerman: You mean the name of it?

A. I don't know.

By Mr. Wooden:

Q. Did the Portland Cement Association have
17438 branches in the different parts of the country?

A. I was chairman of the statistical committee for the Association.

Q. For the entire country?

A. Yes, for the Portland Association.

Q. Do you remember Mr. John R. Morron, president of the Eastern Cement Association?

A. I remember Mr. Morron very well, but I did not know that he was president of the Eastern Association.

By Mr. Wooden:

Q. Looking at this paper marked Commission's
17439 Exhibit 2897, for identification, which purports to be a letter from you to him—

A. That is right.

Q. —does that refresh your recollection about it?

A. Yes, that is right, but I do not remember that he was president. Apparently he was.

17442 Q. Mr. Mallory, in the course of your experience and activity in the cement industry, did you ever carry on any activity designed to control or restrict production?

A. No.

Mr. Leisure: If your Honor pleases—

The Witness: I am sorry.

Mr. Leisure: —that question goes far beyond the issues in the case. If he wants to ask him about any Respondents in this case and what he ever did from the time of his birth, as to Respondents in this case, that is another
17443 matter. But this question calls for a conclusion.

Trial Examiner Norwood: I think he may bring out activities in that regard.

The objection is overruled.

Q. Did you hear the last question, Mr. Mallory?

A. I thought I answered it when I said "No."

Q. And your answer was "No"?

A. That is right.

Mr. Wooden: Now, your Honor, I submit that the exhibit we are just referring to is admissible to contradict the witness' answer.

Trial Examiner Norwood: Let us examine it.

Just as a matter of interest I think the Examiner might want to see what it is.

Mr. Wooden: I also submit that the preceding exhibit numbered from the same printed volume is also admissible on the same ground in addition to other grounds
17444 that I urged.

Trial Examiner Norwood: I shall overrule the objection and receive Exhibit 2897 to be studied along with this witness' statement.

Mr. Wooden: That is very short, your Honor. Why not read it into the record instead of making an exhibit of it?

Mr. Leisure: I don't see any necessity—

Trial Examiner Norwood: If Counsel will read the letter into the record the exhibit may be withdrawn, as such.

Mr. Leisure: I want to point out, now, that this record having been opened we shall ask the same privileges of going into the record also in our case, when we come to it.

Trial Examiner Norwood: Every offer is considered on its own merits.

Mr. Wooden: You went into it on Mr. Reiter's cross-examination, about the character of the statistics used in the old case.

Mr. Leisure: I would like to have the record show one way or another—

17445 Trial Examiner Norwood: Just introduce that and say the exhibit is as follows:

Mr. Wooden: The exhibit is as follows:

(The document heretofore marked for identification as Commission's Exhibit 2897, was received in evidence and is as follows:

"(fol. 1471½) Govt. Ex. No. 513

"The Edison Portland Cement Co.

Stewartsville, N. J.

"January 9, 1913.

"Mr. John R. Morron, President Eastern Cement Association, 30 Broad St., New York, N. Y.

"Dear Mr. Morron: Enclosed please find a copy of report made by our Statistical Committee, which I trust you will very carefully consider.

"Yours very truly, (Signed) W. S. Mallory, Chairman Committee on Statistics.

"P.S.—I have sent a duplicate of the above letter to every member of our Association, and also to the Companies who are not members, as I believe it is desirable to have them all thoroughly understand the danger of overproducing in Winter months. W. S. M."

17446 Mr. Wooden: I would like to have the record show one way or the other whether any objection is made to the lack of further identification of the paper.

Trial Examiner Norwood: No; it is stated, categorically, no objection—

Mr. MacIntyre: I believe Mr. Zimmerman and Mr. Leisure made their statements that they had no objection, but it is not on the record.

Trial Examiner Norwood. The record may now show that identification has been waived on that.

Q. Is the paper I show you, Mr. Mallory, marked Commission's Exhibit 2898, for identification,—are you the author of that?

A. Yes, I am.

17448 (Com. Ex. 2898 was offered and received in evidence.)

Q. Mr. Mallory, referring to Exhibit 2898, which you identified as your document, what were the decided inequalities between the districts that you referred to in your letter (handing document to the witness)?

A. This was a study that I made, as I recall, increasing a number of districts used by the Bureau of Mines, which

were 12, up to 27 different districts, to more nearly cover the shipping areas of the plant.

17449 To illustrate what I mean, the State of Illinois, as I said yesterday, I think it was, has a number of plants in the northern part of Illinois. There are no plants in the southern part of Illinois. They are supplied by the mills on the west bank of the Mississippi, and it was proposed to divide the State of Illinois into a north section and a southern section and that was done in other States to more nearly cover the shipping areas of different plants.

Q. What were the inequalities between the districts that you state in this letter occurred, I take it, in the Bureau of Mines' districts?

A. Just as I have tried to explain that it meant using, as I recall, 27 districts instead of the 12 districts that they used to more nearly cover the shipping areas of different plants.

Q. Were the inequalities—

A. May I add a little to that?

Q. Yes.

A. The F. W. Dodge Company, in their report, made Illinois, Northern Illinois and Southern Illinois, and I think that is where I got my idea.

Q. Well, I still don't understand what the nature of the inequalities were.

A. I thought it would be a better distribution. I drew those two maps and I thought it was—was that Mr.

17450 Brown's letter?

Q. Yes.

A. I think they were sent to Mr. Brown and two or three others, and somebody suggested that I take it up with the Bureau of Mines, which I did. I came to Washington and talked to the Bureau of Mines and they objected to it because they said it would spoil all their past records, and so the idea was dropped.

Q. I am sorry, Mr. Mallory, I am trying to ascertain what the inequalities were between the districts that you refer to in your letter, and I still do not believe I have got an answer.

Trial Examiner Norwood: In what respect were they unequal?

A. Perhaps in using the word "inequalities" I didn't use the right word.

By Mr. Wooden:

Q. What did you mean?

A. I meant that the proposed 27 districts in my judgment more nearly covered the shipping areas into which the various plants shipped.

Q. I understand your proposed rearrangement was dropped?

A. After my talk with the Bureau of Mines, yes.

Q. I am showing you a duplicate of Exhibit 2620. That is your letter, isn't it?

17451 A. Yes, it is mine.

Q. Did you make any change after that time, in December, 1934, in your policy that you stated here in the third paragraph: "In all cases where one company ships for another, the number of barrels involved is added to the total of the company's for whose accounts the shipment is made, and deducted from that of the shipping company, so that the item is not duplicated."

A. Yes, that was changed. If you note, that letter was prepared not by myself but my secretary.

Mr. Leisure: Exhibit 2620?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. What change did you make?

A. May I see the number of barrels?

(A document was handed to the witness.)

A. When the matter was called to my attention the 14,978 barrels which had been included in the total shipments for District No. 7 were deducted the next month and added to the shipments in District No. 6.

Q. What difference does it make whether the figures like that are credited to one district than to another?

A. As I said before, every month I checked the totals of the figures that I receive with those of the Bureau of Mines, and in checking that this error was discovered.

17452 Q. Well, for the purposes of your statistical service, what difference does it make whether that 14,000 barrels, whatever it was, was credited to one district or to the other?

A. If the matter had been called to my attention at the time, the error probably would not have happened.

Q. I still would like an answer to my question. What difference did it make whether that error occurred or not?

A. The shipments from District No. 6 as reported to the Bureau of Mines should check with my totals and by an error it was put in District 7 and should have been in District 6.

Q. When you find that your figures don't check with the Bureau of Mines do you undertake to find out what the source is and the cause of the variation?

A. If we can, yes.

Q. And how do you do that?

A. It is not an infrequent thing for us to receive a report where the typewritten figures are transposed. We check those every month and then we go back to the particular company to which figure is right.

Q. How do you know which company is wrong?

A. Because we have their report from the previous month to check from.

Q. But you don't have the Bureau of Mines' company report, do you?

A. No, we do not.

17453 Q. Then how do you find out which company is wrong?

A. Just as I have tried to explain. If the—

Q. Do you write to all companies in the district?

A. Sometimes questions have come up, yes, so that has been necessary.

Q. In other words, you could not put your finger on it without making some search to find out whether it was—to find out just who it was that made the wrong report?

A. No, not any particular company.

Q. What was the situation that calls for a committee on reconciliation of cement statistics in 1935?

A. I was not a member of the committee and had no part at the meetings.

Q. You say you had no part at the meetings?

A. Yes; that is my recollection.

Q. I am showing you a paper marked Commission's Exhibit 230-N, for identification. Wasn't a copy of that sent to you and received by you (handing document to the witness)?

A. I presume I received a copy although I have no recollection of it.

Q. Pardon me.

A. Right. I see I apparently did sit in the meeting but I have no recollection of it.

Mr. Wooden: I offer this 230-N in evidence. That document was identified by Mr. Giblin as coming
17454 from the files of the Nazareth Company.

Trial Examiner Norwood: Any objection to this?

Mr. Leisure: We raise no objection about the letter having been written by the Respondent to another Respondent so there is no objection as far as identification is concerned, but the subject matter of the letter has nothing to do with this case, and it does not prove or tend to prove any issues in the case. We object to it on that ground.

Trial Examiner Norwood: The objection is overruled and the exhibit is received as marked, Commission's Exhibit 230-N.

(COM. EX. 230-N was offered and received in evidence.)

By Mr. Wooden:

Q. Do you remember who were on this committee on reconciliation of cement statistics?

A. I do not.

Q. Was Mr. Harold Scott and Mr. John J. Porter on it?

A. Mr. Porter was on. Whether Mr. Scott was on or not, I don't remember.

Q. Do you remember now sitting in at the meet-
17455 ing as stated in Mr. Porter's letter, 230-N?

A. I remember very definitely having a conversation with Mr. Porter in his office on that subject. I still do not remember sitting in with the committee. If he says I did, I probably did.

Q. What was the condition that this committee on reconciliation of cement statistics was working on?

A. As I recall, the principal difference was the distribution of the shipments in the several items such as cement that was used for masonry, cement that was used on the plants, cement that might be lost in transportation and exports, as I recall them it was all lumped together.

Q. Was there any conflict between the figures as reported to you and as reported to the Bureau of Mines and as reported to the Portland Cement Association?

A. I have no recollection of the figures that went to the Portland Cement Association. Those that went to the Bureau of Mines, as I have already said, I checked each month, with our own figures, the tota s.

Q. What were the statistics that were supposed to be reconciled or needed to be reconciled?

A. I think I just answered that by having that new distribution for their shipments of each company.

Q. You mean these various classes?

**Yes.**

17456 Q. And those classes had not been separately reported before?

A. No, they had been reported as a total.

Q. Oh, I see. Had shipments for account of other companies been reported separately before that?

A. I don't remember.

Q. Wherein does the breaking down of the totals of the certain classes of business constitute a reconciliation? What was it to be reconciled, is what I am getting at.

A. I don't understand just why the word "reconciliation" should have been used.

Q. That was the title of the committee, wasn't it?

A. So the letter states.

Q. And you can't explain what was to be reconciled?

A. No. Other than the shipments; the distribution of the shipments.

Q. Was Mr. Robeson of the Nazareth Cement Company connected with the work of that committee?

A. I do not remember.

Mr. Wooden: I offer at this time Exhibit 230-L, being a letter of H. B. Robeson, vice-president of the Nazareth Company, to John J. Porter, dated January 2, 1936, and identified by Mr. Giblin as coming from the files of Mr. Robeson (handing documents to Mr. Leisure).

Mr. Leisure: We make the same objection, Your 17457 Honor, that we made to the preceding exhibit. It doesn't relate to any allegation in the complaint. We raise no objection to the identification.

(COM. EX. 230-L, was offered and received in evidence.)

Trial Examiner Norwood: I will take up the matter of this proffer which was made March 7 of Commission's Exhibits 2390 to 2406. I had retained these for study and have completed the study during the noon hour.

The objections were amply stated and they are overruled and the exhibits received as marked.

Those are Commission's Exhibits for identification, 2390, 2391, 2392-A, B, C, 2393, 2394-A, B, 2395, 2396, 2397-A, B, C, 2398-A, B, 2399-A, B, C, D, E, F, 2400-A, B, 2401, 2402, 2403, 2404-A, B, 2405-A, B, C, 2406-A, B, and C.

(COM. EXS. 2390, 2391, 2392-A, 1392-B, 2392-C, 1393,

2394-A, 2394-B, 2395, 2396, 2397-A, 2397-B, 2397-C, 2398-A, 2398-B, 2399-A, 2399-B, 2399-C, 2399-D, 2399-E,
17458 2399-F, 2400-A, 2400-B, 2401, 2402, 2403, 2404-A, 2404-B, 2405-A, 2405-B, 2405-C, 2406-A, 2406-B, 2407-C, were offered and received in evidence.)

Mr. Leisure: If Your Honor pleases, I don't think it appears in the record anywhere the theory on which these exhibits are admitted. I don't know whether we want to make any motions to them or not, but I would like to know from Counsel. It seems to me, as Respondent's Counsel, we have the right to know the theory on which the exhibits are admitted, and I would like to know from Counsel the theory upon which these are received.

Trial Examiner Norwood: We have discussed this so many times, and it has been the subject of an appeal and discussed before the Commission.

Mr. Leisure: Does your answer mean, Your Honor, that they are admitted on the ground that they are co-conspirators? Because I am not clear on what theory they are admitted.

Trial Examiner Norwood: Well, that is one ground, and also for the purpose of showing the effects of activities shown on the part of the Respondents, to show cooperative methods being used here by these Respondents and others to carry out the same objectives. There are a number of things. I would not attempt to make an inclusive statement on that.

17459 Mr. Wooden: As far as the theory on which they are offered was concerned, that is all I can speak to, and that would include the theory that these are the acts of parties who joined with Respondents in a common objective and thereby became co-conspirators, and that they are part of the res jestae of Respondents' case.

Mr. MacIntyre: And if Your Honor please, as was stated at the time the offer was made, they do contain considerable showing of the effect of the restriction to certain channels of distribution in the marketing of Portland cement.

Q. Mr. Mallory, I am showing you papers marked for identification as 230-E and 230-F. Are those classes of production that the committee on reconciliation of cement statistics was concerned with?

17460 The Witness: I have no knowledge of what suggested that. It is the first time that I have ever seen that letter, that memorandum, I should say.

By Mr. Wooden:

Q. Are these classes of shipments contained in 230-E and F classes of shipments that you referred to a while ago in your answer to that effect as to the character of the problem that the committee was dealing with?

17461 A. Frankly, I don't understand this letter. I don't understand what it means except that high early sales should be reported to the Bureau of Mines, should be reported to me and to the P. C. A.

By Mr. Wooden:

Q. Yes.

A. That the same should be reported to all three of us on the interchange of business.

Q. Now, there are five classes—

A. Yes.

Q. —of shipments that are set forth there.

A. Right.

Q. Do you recognize those classes as being classes of shipments that you wanted to break down as you said in your testimony so as to get the total broken down into every class?

A. High early strength in shipments and in item No. 1 was included in the totals. Wait, I am wrong. The high early shipments are considered as shown here, the

17462 interchange of shipments among the operating companies is shown separately.

Q. What do you mean by that, shipments for the account of other companies?

A. Yes, and export is shown separately.

Mr. Wooden: I will offer Commission's Exhibits 230-E and F.

17463 It was also identified by Mr. Giblin as coming from Mr. Robeson's file (handing document to Mr. Leisure).

Mr. Leisure: We raise no point as to the identification. It appears to be from one officer of a respondent to another officer in the same company.

It is, therefore, an inter-office communication and there being no showing it was ever seen by any other respondent, we think it should be confined to that company, if it is received, but we object to it being received because it does not refer or have to do with any allegations in the complaint, anyway.

Mr. MacIntyre: On the point Mr. Leisure raised, Mr. Coffin at the time that was addressed to him, I believe it is 1934, isn't it?

Trial Examiner Norwood: October 19, 1935.

Mr. MacIntyre. At that time he was president of the Cement Institute. Mr. Robeson was manager of sales for one of the respondents, the Nazareth Company.

Mr. Leisure: This does not appear to be addressed to him in his official capacity. For all it shows on its face, it is an inter-office memorandum.

Mr. MacIntyre: Mr. Coffin was only one man and he served as president of the Cement Institute and president of that company. It is difficult to say his right side served the Cement Institute as president and his left side
17464 the Nazareth Company.

Trial Examiner Norwood: Received as marked.

(COM. EX. 230-E and 230-F, was offered and received in evidence.)

Q. Referring to Exhibit 230-L, Mr. Mallory, can you say what, if any, sort of misunderstandings occurred because of the method then being employed in reporting statistics?

17465 A. I have no idea to what he referred.

17466 By Mr. Wooden:

Q. I didn't ask you that, Mr. Mallory.

Mr. Leisure: I submit that is exactly what he did ask him.

Mr. Wooden: Well, I will ask him again, then.

By Mr. Wooden:

Q. Mr. Mallory, did you learn of any misunderstandings that came about because of the method being used in reporting statistics, prior to the time the committee on reconciliation of cement statistics took the matter up?

A. I think I understand now what you mean. I did not, before.

It was at my suggestion that a revision be made in the method of reporting because in making the monthly checks with the Bureau of Mines' report I found there were differences and when I talked to some of the companies I found some were reporting export and some were not, and that was responsible, so I suggested that they all report the same way.

Q. You mean by "export," foreign trade?

A. Yes, I mean outside the country when I speak of "export."

Q. Is there any cement exported to foreign countries as distinguished from insular possessions?

A. Yes. However, it is largely the high early strength, and white cement.

Q. No standard Portland cement?

17467 A. Some, yes, but nothing like it was many years ago.

Q. Showing you a paper marked 2899, for identification, is that your letter; did you write that (handing document to the witness)?

A. Yes, that is my letter.

17468 (COM. EX. 2899 was offered and received in evidence.)

Q. Referring to Exhibit 2899, Mr. Mallory, did the Bureau of Mines give you help on the matter as you said they had done previously?

17469 A. My recollection is they declined to give us help.

By Mr. Wooden:

Q. I am now showing you papers marked 2900 to 2906, inclusive. Do those represent correspondence that was received by you and answered by you?

A. Yes, I remember that correspondence.

17470 (COM. EX. 2900, 2901, 2902, 2903, 2904, 2905, and 2906, were offered and received in evidence.)

17471 Q. Mr. Mallory, you have suggested an Exhibit 2905, or us, rather, of Mr. Morse, as to whether he 17472 objected your advising the Ash Grove Company, which had brought the matter to your attention, whether he objected to your suggesting if Ash Grove was further interested to take the matter up with Mr. Morse.

A. May I see the original letter of Ash Grove?

Mr. Wooden: I didn't offer that. It is here somewhere.

By Mr. Wooden:

Q. Will 2900 answer your purpose, showing you acknowledged it to the auditor?

A. Yes, this gives me the information I want.

Q. That is sufficient?

A. Yes. My recollection is that the difference was

called to our attention by the auditor of the Ash Grove Company.

Q. That is right.

A. Yes.

Q. Did you tell Mr. Sunderland he might take the matter up with Mr. Morse, or vice versa?

Mr. Leisure: Mr. Sunderland, did you mean?

Mr. Wooden: Yes.

Mr. Leisure: If it is in the exhibit, the exhibit will speak for itself.

A. I don't remember, but my recollection would be that I only corresponded with their auditor.

17473 The witness was shown papers marked for identification Com. Ex. 2907, 2908, 2909, and asked whether those are copies of letters two of which he wrote and one of which he received. He said: "The letter to Mr. Wecker, October 1, I wrote. The letter of October 25 to Miss Bagley was written by my secretary."

"L. D." was his secretary, Miss Dornholz. Com. Ex. 2909 is written by the witness.

17473 (COM. EX. 2907, 2908, and 2909, were received in evidence.)

Q. Mr. Mallory, will you explain how you went about making the estimate for the shipments of the Marquette Company from those two mills as indicated on Exhibit 2907?

A. You see this letter was dictated by my secretary. I don't recall at all.

Q. She says you asked her to send that estimate?

A. I was away on my vacation and she phoned me, as I recall, and just how we got those figures I don't remember.

Q. Can you explain how it would be possible to get at that?

A. Yes.

Q. All right, do that.

A. It is possible to make an estimate based on what a company has done before.

Q. I see. But you are not sure just how you did it in that case?

A. No, I am not sure how it was done.

17475 The witness identified Com. Ex. 2910, 2911, 2912, 2913, 2914, 2915 A and B as copies of correspondence

between the witness and the other parties indicated; Com. Ex. 2916 A to D, inclusive, as a result of a study that the witness made at Mr. Treanor's request, as he recalls; and he thinks this is a part of that study (indicating).

Q. Do all of these documents relate to your study of cross-shipping?

17476 A. Yes.

Q. Will you tell us how you came to make any study of cross-shipping?

A. I think Mr. Treanor requested me to do so.

Q. Do you know what the circumstances were at the time?

A. He was in New York and he asked me if there was any way of getting at some idea of what the freight loss might be, and I went to work at it and prepared that statement for him.

Q. As to Commission's Exhibit, for identification, 2916-A, that is merely addressed "Dear Sir." Was that a circular?

A. I don't know to whom that letter went. I imagine it went to him.

Q. Why wasn't it addressed to him as such instead of being in circular form?

A. That I don't know.

Trial Examiner Norwood: Did you send it to more than one person?

The Witness: I may have. I may have sent it to two or three others, but I don't remember. My recollection is that it was not distributed to all of the members of the industry—I don't mean the industry, I mean the Institute.

By Mr. Wooden:

Q. If it was suggested to you that that particular paper was located in the files of J. B. Cabanis out in Iowa,

17477 what would you say as to the extent of the distribution, then?

A. I am still of the opinion it was just sent to a few.

Q. How did you determine which few to send it to?

A. I can't tell, from my recollection.

Mr. Wooden: I will offer these exhibits.

Trial Examiner Norwood: Any objection?

Mr. Leisure: May I ask the witness a question about one of these exhibits?

Trial Examiner Norwood: Certainly.

*Examination on Voir Dire by Mr. Leisure.*

Q. Mr. Mallory, I observe that this Exhibit 2916-A, which you have said is one of your letters dated May 3, 1935, and it apparently refers to an enclosure. Do you know whether or not that is the enclosure that it refers to?

A. I think it is.

Q. Now, here are two subsequent exhibits in that same letter, 2916-C and D, bearing different dates, I mean different from the date of the letter. Do you know whether or not these had any connection with your letter?

A. Well, the second sheet you notice here—

Q. The date seems to be torn off across the Commission's stamp.

A. Here is District 6, District 7 up to District 12, so these two sheets must have gone together.

17478 Q. What about this one other here? You will observe that has a different date.

A. Yes, that was made at a different time.

Q. Did it have anything to do with this letter?

A. I think not.

Mr. Wooden: It was one day before the letter, Mr. Leisure, May 2, 1935; the letter is May 3, 1935, and you will notice that these things carry these serial letters, A B, C, D. There is D (indicating), and here is A (indicating).

The Witness: It looks as if they were both enclosed.

17481 Mr. Wooden: I did not think it was necessary, but, Your Honor, you will no doubt remember that John Treanor, to whom one of the witness' letters was addressed, was chairman of the marketing and research committee of the Institute, and Professor Burns was employed by that committee to conduct an economic study of the basing-point system in cement, and the subject of cross-shipments was undertaken, obviously, in that gen-

17482 eral connection, or at least, under that setting.

Mr. Wooden: The cross-hauling, cross-shipping of cement under the basing-point system is one of the

17483 effects of the system that is in issue.

Trial Examiner Norwood: These letters were written during your employment as statistician of The Cement Institute, were they not?

The Witness: May I ask the dates?

Trial Examiner Norwood: October 23, 1934.

The Witness: Yes.

Mr. MacIntyre: On this point Mr. Leisure has raised concerning the showing of facts, it is clear from the witness' testimony as well as the documents themselves that the figures contained thereon are factual figures as to the amount of shipments that have taken place.

Of course, there is some discussion as to how much could have been saved from those figures if shipments had been made in another way, but that, nevertheless, does not detract from the fact that the figures of the shipments that had been made are factual figures themselves.

The Witness: Now, this 2916-A to D is a tabulation here of distribution of 1934 shipments.

Mr. Leisure: I want to differ with Mr. MacIntyre that these are factual figures. There is no showing of any kind that they are, and if that is the case the exhibits should be received as to those figures, and the rest of the discussions would not be necessary in the record.

17484 (COM EXS. 2910, 2911, 2912, 2913, 2914, 2915-A, 2915-B, 2916-A 2916-B, 2916-C, 2916-D, were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Mallory, showing you Exhibit 2910, which you have just identified as a copy of your letter to Mr. John Treanor as referring also to Exhibit 971-28-H to 28-M, is not the letter exhibit your study, the results of your study, which was referred to in 2910?

A. Apparently it is.

Q. Are the shipments that are included in 971-28-H to N, are the shipment figures there the actual figures that you obtained from reports made to you by members of the Institute?

A. Where the figures represents the reports of the individual companies, they are. Where they represent the figures of a chain company like Lehigh, for instance, in Districts 1 and 2, I only had the totals and I made an estimate of their figures, distribution of their figures.

Q. But the totals in such case were furnished by the companies?

A. Not necessarily; not necessarily. Part of their
17485 shipments might have gone into some other district, rather than 1 and 2.

Q. But as to—

A. Those I had to estimate.

Q. But as to the totals that you broke down by an estimate that way—

A. Yes.

Q. —that came from the company's reports, didn't it?

A. Yes.

In reply to the question whether or not paper marked, for identification, Com. Ex. 818 BBBB is a photo-
17486 graphic reproduction of an original letter written by the witness bearing his signature, the witness said, "Yes, I wrote that letter." Papers marked Com. Ex. 818 CCCC to FFFF inclusive are papers which were enclosed as mentioned in 818 BBBB; the witness thinks he is the author of the statements made in Com. Ex. 818 CCCC to FFFF inclusive; in reply to the question whether papers marked, for identification, Com. Ex. 821 D is a photographic copy of a letter signed by the witness and bearing his signature, the witness said, "Yes, that is my letter." The papers marked Com. Ex. 821 E to J, inclusive are the memorandum which is referred to in 821 D; the witness is the author of the statements in papers marked
821 E to J; the witness was shown papers marked, for
17487 identification, as Com. Ex. 562 ZZZZZZZ, Com. Ex. 562 AAAAAAAA and 562 BBBBBBBB, inclusive, and asked whether the first of those papers was a communication that the witness sent to Mr. Treanor. The witness said: "These are duplicates of the others." As far as he can see, the witness thinks these are duplicates of the other statements. That can be determined by comparison. In reply to the question whether the witness was the author of Com. Ex. 561 AAAAAAAA to DDDDDDDD, the wit-
ness said, "Isn't it the same date as the other one,
17488 April 30, 1934?" In substance it is the same. This is his work, and he thinks that Com. Ex. 562 ZZZZZZZ is his communication to Mr. Treanor.

Q. Mr. Mallory, I am showing you papers marked 2917-A to O, inclusive. Can you tell us what that is and if you have seen it before (handing documents to the witness)?

A. That was one of the plans adopted by the committee

who were considering a matter of a plan for sharing available business.

Q. A committee of the Institute?

A. Yes.

Q. Adopted when?

A. It never was adopted.

Q. You said "adopted by the committee," didn't you?

A. No, worked out by the committee.

Q. This list of committee members that appear on some of these pages at the end of the document; are those the key numbers you use in your statistical work?

A. Those were the key numbers I made in 1925.

17489 Q. And were you using them in—

A. Still using them.

Q. You are still using them?

A. Yes.

Q. Mr. Mallory, did the proposed plan for allocating business under the code in 1934, was that finally and definitely rejected?

A. There was a meeting in Chicago—the date, I do not remember—the matter was discussed and it was voted down.

Trial Examiner Norwood: When was that?

By Mr. Wooden:

Q. Can you say when it was?

A. I think some time in the summer, early summer of 1934, but I don't remember.

Q. A meeting in Chicago of what? What was the meeting in Chicago?

A. Meeting of The Cement Institute to consider this plan.

Q. Did you attend?

A. I did.

Q. Hadn't the board of trustees of the Institute in March, 1934, adopted a plan for allocation of business?

A. Not so far as I know. I am not a member of the board.

May I add to that?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

17490 Q. Yes, sir.

A. May I complete that?

Q. Yes.

A. As I recall; the code gave us permission to prepare a plan which could not be effected until approved by the code authority.

Q. After the plan was rejected in, I believe you said, the early summer of 1934—

A. That would be my recollection.

Q. —were efforts made in any such sections to carry on the preparation of such a plan?

A. I do not know about the various sections. I do know at this meeting there was so much disapproval of the plan that it was, so far as I know, absolutely abandoned at that time.

Q. Weren't you in close enough touch with the situation to know whether or not after the time that you mentioned activities continued with reference to working out an allocation of business?

A. I do not. After that we came back to New York. I would have no opportunity of contacting the different sections, as I recall.

Q. Can you say whether or not any efforts were made to work out a separate plan or a sectional plan on the Pacific Coast?

A. I have no knowledge of what happened on the Pacific Coast.

17491 Q. You made a trip out there, didn't you?

A. I made a trip out there before this meeting.

Q. Do you know of any efforts made to prepare a sectional plan for the Pacific Coast?

A. No.

May I supplement that?

Q. Yes.

A. I talked to the members of the Pacific Coast about this plan and in the meeting I attended they voted it down.

Q. There were two plans, weren't there?

A. There were half a dozen different plans, altogether.

Q. Wasn't one of them called the Mallory plan?

A. The Mallory—some of them gave it the name of the Mallory plan to designate what I called 2, 3, 4, 5—I think we had six different plans altogether.

Q. Which was the Mallory plan?

A. The first.

Q. Was that the one that was voted down?

A. No, this was the one that was voted down (indicating document).

Q. Was the Mallory plan ever voted down?

A. The Mallory plan was never put up for vote, as far as I know.

Q. Do you know whether or not any efforts were made to work out a plan of allocating business in this
17492 Districts 1 and 2, after the plan was voted down in the summer of 1934?

A. I have no knowledge of an effort being made in Districts 1 and 2 after this plan was turned down.

A. As to Districts 1 and 2, I had no knowledge. Undoubtedly I expressed my regret to individual members that the plan had been voted down.

17493 Washington, D. C.,
March 10, 1939.

17495 W. S. MALLORY thereupon resumed the stand and testified further as follows:

*Direct Examination (Continued).*

By Mr. Wooden:

Q. Mr. Mallory, referring to Commission's Exhibit 2891-B, for identification, it being one of the sheets
17496 of that exhibit comprising the McGill article that was submitted to the Institute for review. I believe you said that the figures in the table on that sheet you believed were Bureau of Mines' figures?

A. Yes, I think they are, they look like Bureau of Mines' figures to me.

Q. Does the relationship between production and shipments in that table accord with your understanding of the conditions existing during that period in the industry?

A. Well, if they are the Bureau of Mines' figures, naturally that would be the relation at that period.

May I amplify that statement a little bit?

Q. Yes.

A. You asked me yesterday what the relation between production and shipments was, subsequent to 1930?

Q. Yes.

A. And, as I recall, my answer was that they were about the same in quantity. I would like to add to that that from—for the period covering 1930 up to and including 1937, the production for that period, as I recall, was about a half of one percent greater than the shipments. The very nature of the business, and the stock-house limitations, tend to make production and shipments fairly equal.

Q. And since 1937, how has it been?

17497 A. Well, 1938 I haven't had a chance to figure out; the figures are not—.

Q. Did you mean to include 1937 in your figures?

A. I said 1937 because the tabulations that I made included up to 1937.

Q. Yes.

Referring to Exhibits 2892-A and B, that being the one in which you commented on the McGill article to the effect that the practical capacity was only 85 percent of the actual, and then you stated, I believe, that you should have said the practical production instead of capacity; is that right?

A. Yes.

Q. What was the relation of production, actual production, to capacity between 1930 and 1937?

A. I could not give you the percentage from memory but I would like the opportunity to define a little more definitely what I meant by—

Q. Just in a moment.

A. Yes.

Q. Wasn't the actual production during the period that I have outlined never more than 50 percent of the capacity?

A. From 1930, you say?

Q. Yes.

A. I would think for that period—1930—you

17498 mean the average for the whole number of years, from 1930 to 1938, inclusive?

Q. Yes.

A. I would say it was less than 50 percent.

Q. And in the years preceding, say, 1932, 1934, and 1935, wasn't it even much less than 50 percent?

A. Yes. I think it got down, as I recall, in 1932 or '33 something like 22 percent.

Q. And what was it for 1934, would you say?

A. I am not sure, but I think it was somewhere in the neighborhood of 30 percent. Those are pure estimates.

Q. So that when you wrote your comment on the McGill service in March, 1935, there hadn't been anything approaching 82 percent actual production for a number of years, had there?

A. I think I am clear: When I state, based on cement production, the maximum production was in 1924 or 1925—

17499 A. As I recall it was 85.3 percent of the cement capacity at that time. As I recall, that is the highest that—

Trial Examiner Norwood: Didn't the capacities change through these years?

The Witness: Yes; the capacity increased very rapidly from 1924, I would say up to about 1928.

Trial Examiner Norwood: You are speaking, then, of production percentage?

The Witness: Percentage; right.

17500 A. What I was trying to tell him was what my recollection at the time I wrote the letter was, as to what percent of the total capacity had been produced, and—

By Mr. Wooden:

Q. But 82 percent, nothing like 82 percent of the total capacity had been produced for a number of years just immediately prior to your letter—

A. No.

Q. —is that right?

A. But 85 percent had been produced—

Q. Way back—

A. —in our peak year.

Q. Yes, way back there.

A. Yes.

17501 Q. Not since 1930?

A. Not since 1930.

17502 Q. Mr. Mallory, looking at Commission's Exhibit 2891-B, for identification, and the tabulation of production and shipment figures by districts, for the years 1931, 1932, and 1933,—wouldn't you characterize that as a rather remarkable coincidence between the amount of the production and the amount of the shipments?

Mr. Leisure: Now, just one moment. These are the

same exhibits that Your Honor ruled on yesterday, and they were ruled out, and now we are starting in again today, and I suppose they are going to spend further
17503 time to see if we cannot get them in today.

The question is improper. He is asking the witness to characterize the exhibits and draw conclusions from exhibits which are not in evidence.

Trial Examiner Norwood: Yes.

Mr. Leisure: And I object to the question.

Trial Examiner Norwood: The objection is sustained.

Mr. Wooden: Now, Your Honor, I do not know whether Respondents' Counsel suggested that they might want to offer these papers, and I said that I hoped they would, and we could agree on them, but whether or not they do, I again submit that they are competent, relevant, and material, by reason of the testimony of the witness, and by reason of Commission's Exhibits 2892-A, B, which is the witness' contemporaneous statement at the time upon these papers which so far have been excluded.

I, therefore, re-offer them.

Mr. Leisure: We make all those objections that we made yesterday, and renew them, with the same force and effect.

Anything that was written by a man by the name of McGill to this witness is not binding on the Respondents in this case unless it is shown that they acted on it, or they made out, or had some control of his writing of the letter

17504 Trial Examiner Norwood: I think they might be admitted for the special purpose of explaining this exhibit which was written by the Respondent.

Mr. Wooden: To the witness.

Trial Examiner Norwood: And not for any factual statements or figures contained therein.

Mr. Leisure: Will Your Honor hear me on that?

Trial Examiner Norwood: Yes.

Mr. Leisure: The author of the letter is not in the courtroom. If Mr. Mallory can explain anything about his own exhibit which is in evidence, he is on the stand and can be asked about that.

Trial Examiner Norwood: Well, you have just objected to him doing that.

Mr. Leisure: I submit that he should be permitted to

explain about his own exhibit. Your Honor is suggesting these be admitted to explain the exhibit in evidence.

Trial Examiner Norwood: Yes, because he made certain statements based upon the tabulation.

Mr. Leisure: As he is on the stand, and can be asked about that, that is my point.

17506 Trial Examiner Norwood: I shall overrule the objection and admit these exhibits solely for the purpose of explaining the references in Commission's Exhibits 2892-A and B.

(COM. EX. 2891-A, 2891-B, 2891-C, and 2891-D was offered and received in evidence.)

Trial Examiner Norwood: It is clearly understood it is not for proving the truth of any of those figures in there.

17507 The witness identified Com. Ex. 2918 as the 10th-of-the-month report arranged by companies instead of individual plans. This particular one happens to cover the month of October. It shows the clinker production for October and the clinker production for the 12 previous months; the same for cement and the same for shipments. That is the witness' compilation.

17509 *Examination on Voir Dire.*

By Mr. Leisure:

Q. As I understood the Reporter, you have said that is a 10th-of-the-month report. Will you look at it and see if it is a complete report or the first page of the report?

A. That simply covers districts 1 and 2.

By Mr. Wooden:

Q. Is it complete for those districts?

A. Yes.

(COM. EX. 2918 was offered and received in evidence.)

Q. Mr. Mallory, referring to Exhibit 2918, what is the company whose key number is given as 224?

A. That is Vulcanite.

Q. Do you know why you show no production for Vulcanite and yet some substantial shipments here of 516,000 barrels for the 12 months' period?

A. Vulcanite have not been in operation for a

17510 number of years and they buy most of their cement from the Hercules Company.

Q. Is that why you show no clinker stock or cement stock on hand for them?

A. Right.

Q. Mr. Mallory, yesterday you identified Commission's Exhibits 2917-A to O, inclusive, and told us what it was. Now, I am showing you some additional papers that have been marked for identification as 2917-P to T. Are these papers, papers that were prepared in connection with 2917-A to O, inclusive?

Mr. Leisure: When you say "these papers," Mr. Wooden, what are you referring to?

Mr. Wooden: 2917-P to T, inclusive.

A. They were prepared for the committee that was considering the problem of some plan of allocation and
17511 covered different plants.

Q. And were they prepared by you?

A. Prepared by me.

Q. Did you distribute them?

A. I think—in fact I am quite sure they went out the same time as the suggested plan of allocation went out.

Q. State what distribution was given them, Mr. Mallory?

A. I think they were sent to all the members of the Institute.

Q. And were they sent along with Commission's Exhibits 2917-A to O, inclusive?

A. I think they were together.

Q. (Indicating.) I am showing you sheets
17512 marked Commission's Exhibits 2919-A and B, for identification, Mr. Mallory. Are those sheets the result of your work?

(Witness examines document.)

A. Yes, I prepared that.

Q. Both sheets?

A. Yes.

May I—may I ask the privilege—this recalls what I could not remember the other day, about "out of balance."

Q. Yes.

A. May I use this to explain that to you?

Q. Yes.

A. (Referring to Exhibits 2919-A and B): I think I talked the other day when the question of "out of balance" came up, I was not clear at that time, from my memory—I have not had occasion to use "out of balance" for

five years—and what I meant by "out of balance" was that in some districts, I think I related—I mentioned—district 5.

"Out of balance" means this, that in district 5 there is a certain amount of cement consumed, we will say 10 million barrels—that is right, 10 million barrels— the plants within the State of Illinois, or within district 5, only manufacture 8 million barrels. In other words, there is 2 million barrels comes in from adjoining districts. The adjoining districts would be the western part of Ohio,

Michigan, that part of district 6 that lies south of
17513 Kentucky, and east of Missouri, and eastern Iowa, all of whom should be included.

So that "out of balance" means the difference between the consumption in the district and the cement that is shipped in the plants in that district.

Q. Within that district?

A. Yes.

Q. To destinations within that district?

A. No, independently of where it goes.

Q. Take the illustration of 8 million and 2 million—2 million was shipped in from outside of the district; is that right?

A. I am wrong about that; you are right. It is shipments within the district.

Q. Yes.

A. You are right.

Q. Take the 8 million and 2 million illustration that you just gave. The 2 million shipped from outside of the district—

A. Yes.

Q. —to points within the district represent the amount that you consider out of balance?

A. Out of balance.

Q. All right.

A. Yes.

17514 Q. I think we have got that very clear.

A. Yes.

Q. What was your purpose, Mr. Mallory, in trying to ascertain the exact amount by which the various districts were out of balance, in that sense that you have described?

A. Well, I think I have testified before that on my work, which I use in making my estimates of probable consumption, are based on the consumption figures and

not the shipment figures, so that every month it is necessary for me to know what the difference is.

Q. Well, I am still asking you what your purpose was in trying to ascertain to what extent the districts were out of balance with each other in the sense that you have described?

A. I am afraid I do not understand that question.

Trial Examiner Norwood: Read the question to him. (Last question read.)

A. Well, that is a necessary part of my work, when I am making these estimates of the probable consumption.

By Trial Examiner Norwood:

Q. How is that necessary?

Mr. Wooden: Yes.

A. I have to know each—as I am dealing with consumption—I have to know each month just what the consumption is in each district, and the difference, from what the shipments may have been, made by the plants in that district.

17515 By Trial Examiner Norwood:

Q. Why?

A. That is part of my work; otherwise I could not make the—

Q. And for any other reason?

A. No.

Q. Why is it part of your work?

A. Because I could not make my estimates—

Q. What useful purpose does this information serve?

A. Well, it is so useful to me that I could not—I could not make my estimates of probable consumption unless I had that information.

Q. Well, how is it useful?

A. How?

Q. How is it useful?

A. I don't know as I can make that any more clear. If I only had shipments to deal with, shipments across the district lines—

Q. Yes.

A. —and they vary very greatly: in some districts over other districts. The consumption in a district is a distinct thing that comes within the limits of that particular district and that information is necessary to me

in making my estimates of probable consumption, and that is the only purpose it is used for.

Trial Examiner Norwood: Go ahead.

17516 By Mr. Wooden:

Q. But why do you have to make your estimates of probable consumption according to districts, when there are shipments between the districts? Why isn't it enough to know the total consumption?

A. If I used—if I only had the shipments from the plants in the districts, I could not make my estimate of probable consumption, for the reason that the cross-shipments, just as I have explained to you in district 5, a difference of 2 millions of barrels, that is 20 per cent, and so I must know what the consumption is within each district.

17517 Q. Can you say any more, Mr. Mallory, as to why you made these figures showing the net shipments between the districts?

17518 A. Not any further than I have already said.

By Mr. Wooden:

Q. You sought to show a number of times, did you not, that the amount of net shipments between districts was a rather insignificant factor,—did you not?

A. It is very large in some districts; it is quite small in others.

Q. I mean in proportion; the percentage of it compared to the total districts is quite small. Didn't you make attempts to show that?

A. I don't get that question. I don't understand you.

Trial Examiner Norwood: Read the question.

(Last two questions and answer read by the Reporter.)

A. I think when this question of "out of balance" came up the other day, if my memory is clear, you showed me a figure of district 5, which you called my attention to, of 12.2 percent. That was the percentage of "out of balance."

Trial Examiner Norwood: Does that answer your question?

Mr. Wooden: No, Your Honor.

Trial Examiner Norwood: I am going to ask you to answer that question.

The Witness: I am doing my best, sir.

17519 Trial Examiner Norwood: Yes; see if you cannot give him a more direct answer.

The Witness: Yes.

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Q. You sought to show a number of times, did you not, that the amount of net shipments between districts was a rather insignificant factor,—did you not?")

Trial Examiner Norwood: Don't read the rest of the questions.

Did you or did you not seek to show that?

The Witness: I didn't seek to show it. The figures, themselves, show what the differences are.

By Mr. Wooden:

Q. Did you comment upon it?

Trial Examiner Norwood: Did the figures show it?

A. I may have commented, but I have no recollection that I did.

By Mr. Wooden:

Q. Now, referring to Exhibit 2913, which is the first page of a letter which you identified as yours, didn't you comment there that the purpose of the study of the differences in shipments between the 12 districts was to bring out that the net differences for 9 years was but a

17520 small percentage of the total shipments for the same period?

A. The districts as a whole, yes, but as applied to the individual districts, no.

Q. Didn't you work it out to show it was a small percentage for the individual districts?

A. No. It varies very much for the individual districts.

Q. It varies, but doesn't this Exhibit 2919-A and B work it out for the individual districts?

A. Yes, it does.

May I complete that answer?

Q. Yes.

A. It shows that in different years the percentage runs from a quarter of one percent up to 26 percent, is the largest amount I find.

Q. Yes. And that for all the districts combined, for a period of nine years, was only 5.22 percent; is that right?

A. Yes, that is right. That takes, of course, the entire United States.

17522 (COM. EX. 2919-A and 2919-B was offered and received in evidence.)

Q. Referring to Exhibit 562-10C, Mr. Mallory, is 17523 that your compilation; chart (handing document to the witness)?

A. Yes. I had that chart drawn.

Q. Is the paper which is Commission's Exhibit 562-10E—is that your work (handing document to witness)?

A. (Witness examines exhibit.) That I have never seen before, as far as I can remember.

Q. (Showing document to witness.) Showing you Commission's Exhibit 937-WW and XX,—is that your letter?

A. (Witness examines document.) Yes, it is a letter I wrote Mr. Treanor.

Q. Yes.

(Showing document to witness.) Showing you Commission's Exhibit 953-WW,—is that your letter?

A. (Witness examines document.) Yes, I wrote that.

Q. Showing you Exhibit 971-ZZ, 3-A, 3-B, and 3-C, did you receive from Professor Burns the first of those documents and is 971-3B and 3C your reply thereto (handing documents to the witness)?

A. Yes, it seems to be the letter I received from Professor Burns and it is my reply. I should say a copy of the letter.

Q. Yes; thank you.

Showing you Commission's Exhibit 1025-C-E and 1025-G-H, did you receive that letter, the original of that letter, from the Marquette Company (handing document to the witness)?

A. I think I did.

17524 Q. Did you receive Commission's Exhibit 1025-I from Mr. Reiter (handing document to the witness)?

A. I think I did.

Q. Is Commission's Exhibit 1025-A, B your letter to Mr. Reiter (handing document to the witness)?

A. Yes; I wrote that.

Q. 1025-O, is that your letter (handing document to the witness)?

A. Yes.

Q. Mr. Mallory, before excusing you from further di-

rect examination, I am going to ask that you provide and submit the following information from your records:

The names of your subscribers as of July 1 each year from 1926 down to 1933, and the names of your subscribers on August 31, 1933.

Mr. Leisure: One moment, please.

If Your Honor pleases, I think this statement, being in the nature of a request to produce, should be properly directed to Counsel.

We will take that under advisement.

Trial Examiner Norwood: He may ask the wit-
17525 ness if he can produce them.

Mr. Leisure: No, he is asking him if he will produce them.

Trial Examiner Norwood: He may ask him that.

Mr. Wooden: I assume he will take advice from Counsel before deciding.

I hadn't quite finished.

Trial Examiner Norwood: Complete your statement.

Mr. Wooden: All the information which your records show concerning shipments for the account of other mills during the years 1936, 1937, and 1938.

The Witness: May I ask a question?

Trial Examiner Norwood: Yes.

The Witness: You mean the individual amounts, or do you mean the percentage?

Mr. Wooden: The individual amounts. In other words, all the information that your records show about it.

Mr. Zimmerman: May I have the last one you requested?

Trial Examiner Norwood: Read it.

The Reporter: "Mr. Wooden: All the information which your records show concerning shipments for the account of other mills during the years 1936, 1937, and 1938."

17526 Mr. Zimmerman: May I have that last statement read? I mean the things that you want?

Mr. Wooden: You mean the complete statement?

Mr. Zimmerman: Yes.

Trial Examiner Norwood: Read him the complete statement.

(Last remarks by Mr. Wooden setting forth list of things required was read by the Reporter.)

By Mr. Wooden:

Q. Also the figures for the individual mills reporting to you showing their capacity, production, shipments, distribution of their shipments by States for the years 1936, 1937, and 1938.

A. The latter part of that information I do not have.

Q. What do you mean by the latter part?

A. The shipments into States.

Q. Do you have all the other information—

A. I have.

Q. —available?

A. Yes, I have the production and shipments.

Q. I mean, the other information that I also asked for, —do you have that available?

A. I think that is available, yes.

Q. Are you individually willing to provide the information requested?

17527 Mr. Leisure: Oh, I object—I object to that question. It is improper procedure and I do not think that it should be indulged in. If Counsel wants to subpoena this witness he knows how to use subpoenaes.

Trial Examiner Norwood: Well, I think that—

Mr. Leisure: And if he wants to ask anything in the nature of a request to produce, why, the proper person to talk to is the counsel for this witness.

Now, I object to this procedure.

Trial Examiner Norwood: I see no objection to the witness—

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: (Resuming) — stating whether he is willing to produce these things or not.

Mr. MacIntyre: —and if Your Honor please, in the light of Mr. Leisure's statement, let us not forget that this witness has been subpoenaed; he is here now under subpoena; he is on the witness stand under oath pursuant to that subpoena.

Trial Examiner Norwood: I shall overrule the—

Mr. Leisure: I think Counsel is not as familiar with subpoenaes as I thought he was. The witness is not here under subpoena duces tecum.

Trial Examiner Norwood: I shall overrule the 17528 objection and permit the witness to answer that question any way he wishes.

Read that question.

A. Naturally—

Mr. Leisure: I object to that now. I think the witness has a right—

Trial Examiner Norwood: You have already objected and the objection has been overruled. Please do not interrupt until the witness answers the question.

Mr. Leisure: Is there not a new question pending?

Trial Examiner Norwood: No.

The Witness: May I have the question?

Trial Examiner Norwood: Read the question.

(Last question read as follows:

"Q. Are you individually willing to provide the information requested?")

A. Part of the information requested is available. Naturally I would talk with counsel about it.

By Mr. Wooden:

Q. Do you mean that your individual willingness to provide it depends upon advice of counsel?

A. I did not say that.

Q. No?

A. I said the information was available, or part of it was available.

Q. I am asking you for your individual position, 17529 whether you are willing to provide it.

A. I—

Mr. Leisure: Now, Your Honor, I want again to object to this practice.

Trial Examiner Norwood: I think his answer to that question was clear. I think I will sustain the objection to the question on that.

Mr. Wooden: All right.

Trial Examiner Norwood: Since counsel objects so strenuously to it.

Mr. Leisure: I object to it, Your Honor, because I think it is improper practice. I think a witness has a right to consult Counsel.

Mr. Wooden: I did not say that he—

Trial Examiner Norwood: He is a Government witness and not your witness.

Mr. Leisure: Well, I am not saying whose witness he is.

Trial Examiner Norwood: Yes.

Mr. Leisure: I am saying he has a right to consult counsel.

Mr. Wooden: I did not intend anything—

Trial Examiner Norwood: I will say that if he has any rights here I will see that they are taken care of.

Go ahead.

17530 Mr. MacIntyre: I think, Your Honor, in the light of Mr. Leisure's statement, that the record should show—

Mr. Leisure: If this is not an objection, then I object to it. If it is just a statement for the record—

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: That is what it is, if Your Honor please, it is a statement for the record, and I would like to make this statement: that the request made here upon this witness by Mr. Wooden is made pursuant to sections 9 and 10 of the Federal Trade Commission Act, and is well within the authority of that Act and the authority of the Commission pursuant to that Act, and it is a matter of now determining whether or not this witness and his counsel is willing to submit to the authority of those two sections.

That is the only thing that Mr. Wooden is attempting to have brought out by his questions on the record.

Mr. Leisure: I think that that statement is an incorrect statement as to those sections, as to what the law is, and I think that the practice followed this morning by both Counsel for the Commission is an improper practice.

17531 Trial Examiner Norwood: Cross-examine.

Mr. Leisure: I have no questions on cross-examination.

I do, however, at this time, want to make a motion to strike all of this witness' testimony, and all of the exhibits.

17533 CHARLES M. JOHNSTON, called as a witness
17534 on behalf of the Commission, being first duly sworn, testified as follows:

*Direct Examination by Mr. Wooden.*

I am presently employed by the Division of Investigation of the Works Progress Administration as a field agent, that is an investigator. I was at one time employed by the Federal Trade Commission during the period, I believe, from April 1, 1931 to about July 1, 1933. During

my employment by the Federal Trade Commission I was assigned to the Chicago office of the Commission and my duties were to make investigations of such cases as were
17535 assigned to me that arose under the Clayton Act and the Federal Trade Commission Act. During the course of my employment I did some work of an investigating nature relating to the cement industry.

Q. Will you state how you came to do that work, and the general nature and the scope of it?

A. Well, it was in May, 1933, possibly the latter part of April, but I believe it was May, that William F. Dinnen, who was then the attorney in charge of the Chicago office, advised me that the Commissioners had requested that an investigation be made as to why the various cement companies had submitted uniform bids to the State of Illinois, in the lettings in the first three or four months of 1933.

I believe there were maybe three lettings in 1933, and, according to the information that Mr. Dinnen gave me, the various cement companies had submitted uniform prices, and one or two of the other attorney-examiners and I were delegated to find out why.

Q. Well, what did you do pursuant to that assignment?

A. Well, the first thing I did was to go to Springfield and talk to Governor Horner.

Q. Well, you do not need to go into all details; but did you call upon any of the cement companies?

A. I did.

17536 Q. Will you state what companies you called on?

A. I called on Marquette Company, which was then located in Chicago.

I called on the Ashgrove Lime & Cement Company in Kansas City.

I called on the Dewey Portland Cement Company in Kansas City.

Do you want all of them that I called on?

Q. No, that is enough. Whom did you see at those three companies that you have named?

A. At the Marquette Company the first person I interviewed was a Mr. Wecker. I have forgotten his first name. He was a vice-president at that time.

I talked to several other people there; I don't remember them. He was the one I talked to mainly.

At Ashgrove I talked to Mr. Sunderland.

There are several Mr. Sunderlands, but this one was the president of the company.

At the Dewey Portland Cement Company I talked to a Mr. Tyler who was, I understood, the president of that company.

I also talked to other people at those places, too, but I don't remember all their names.

Q. In addition to talking to those gentlemen, what else did you do, if anything, at those places?

17537 A. I asked them to supply me certain written information and I also asked them for permission to examine certain of their files.

Q. Referring to your call upon Mr. Tyler of the Dewey Portland Cement Company, will you state whether or not you had any conversation with him regarding the method employed by his company in making prices?

A. Yes, I did.

Q. When, as nearly as you can fix the time, did you call upon Mr. Tyler?

A. I know I interviewed him several times during the months of May and June, 1933. I don't know the exact dates.

Q. Will you give the conversation so far as you can recall it concerning the subject about which I asked you?

17538 A. I asked Mr. Tyler—of course, I don't recall the exact words, but I asked him how they arrived at prices and he told me that the system that generally obtained in the industry and the system he used was that they would pick up, his salesmen when out in the field would pick up competitors' bids and the salesmen would send that in or would telephone it in, if it were unusual or very important, and then they would analyze that price by subtracting the known freight rate of the company that offered this price from their mill to the destination; subtract that and subtract the 40 cents for sacks, and that would give them what their competitor was getting for cement at this particular point and getting that from a number of competitors they were able to determine what mill was governing the price at a particular point, and then it was up to them to meet that or they couldn't sell cement so

17539 they just sold at whatever the obtaining price was.

Q. Did you have any discussion or conversation

with Mr. Tyler as to whether his company used a basing point system in calculating its prices?

A. Yes, I did have a conversation with him about that. He said they did use these basing points.

Q. Did you have any conversation with him with regard to what extent his company initiated price changes?

A. I did ask him about that.

Mr. Tyler told me that their company had a plant at Dewey, Oklahoma.

He said that over a period of, oh, a long time, 30 years, or perhaps never have they ever set a price except once down at Dewey, and I particularly recall this because he said that they increased their price five cents down there at Dewey, having found out they were a few cents lower than their competitors in this very limited region
17540 around Dewey where theirs was the lowest freight rate, and that was the only time they had ever set a price.

He said it was, to the best of his knowledge, usually the large companies and, I believe, he said Lehigh, because they have a plant at Iola, if I recall correctly, that Lehigh at Iola was usually the company that sets the prices. At least that was his opinion, that they did. That is what he told me.

17541 Q. I am showing you a paper that has been marked for identification as Commission's Exhibit 2618 (showing document to witness). Where did you first see that paper—where and when?

(Witness examines document.)

A. I secured this paper from Mr. Tyler, at Kansas City. The date is right on there. I would not recall that date.

Q. Is there any notation on it in your handwriting?

A. Yes, that is my notation in my handwriting.

Q. In the upper righthand corner?

A. That is correct.

Q. When was that put on there?

A. Oh, that was put on there at the time—no, not all of it—I would not put this exhibit number on there; I never did that—but whenever a paper was handed to me, and this one was no exception I would write down from whom I got it, and the date I got it, and put my initials on it for future reference.

Q. Under what circumstances did Mr. Tyler provide you with that paper?

A. At my request.

Q. And what did you do?

A. I asked—now, these were not questions that I had formulated myself. The questions were formulated for us, and I asked him these specific questions—how many barrels they had produced at their Dewey plant—that is Dewey, Okla., plant—and at their Davenport, Iowa, plant
17542 in 1931, and also in 1932; how many barrels they shipped; what it cost them per barrel at both plants, and then the total; what their selling price was per barrel; the net selling price; the percentage of the selling cost to the net selling price, and then the capacity of the mill and the percentage of capacity that they had run in those two years at the two plants.

Q. Was it in response to that request—

A. That was.

Q. —that this paper was provided you by—,

A. That's right.

Q. —by Mr. Tyler?

A. That's right.

(COM. EX. 2816 was offered and received in evidence.)

17543 Q. Now, referring to your conversation with Mr. Sunderland of the Ash Grove Company; will you state whether or not you discussed with him anything on the subject of the basing-point system?

A. I did. I asked Mr.—

This investigating pertained originally to the uniformity of prices in Illinois in 1933—and I asked him how they arrived at this price at Chicago, and this price at other places, and went down this whole list of counties—I believe there are 102 of them—and he told me that he arrived at prices by using this so-called basing-point sytem; in other words, they would pick up a competitor's quotation, on of their salesmen would, they would send it in, he would deduct the known freight rate from that and he would arrive at what mill was governing the price in a given territory around LaSalle or Hannibal or Cape Girardeaux, or wherever it happened to be—Buffington—and then he would—as a matter of fact, he told me that they kept that book—they had a book, I saw the thing, in which one of their clerks, or whoever it was, would mark down every time a new price came in, or every time a new freight rate was issued, and they constantly knew, according to that book, exactly what the price of cement ought to be at a given

point, at a given time, and then he explained that when they made up their bid for the Illinois lettings they
17544 merely took the prices that they had in this price book, that they had accumulated, over a long period of time, and they bid those prices.

Q. You stated that you had a conversation with Mr. Sunderland. Did you ask Mr. Sunderland any questions as to why his company did not sell or price f.o.b. mill instead of delivered?

Mr. Leisure: I object to that question as leading.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled.

A. I did.

By Mr. Wooden:

Q. State what he said.

A. The Ash Grove Company has a plant at Chanute—and he told me that if they were to quote f.o.b. mill prices from that plant at Chanute that the only territory that he would have a real chance of selling in would be half way between there and the next town, Iola or Humboldt—or I have forgotten the exact arrangement of the towns; in other words, it would restrict his selling territory to the place where he had had the lowest freight rate, and being located in that gas belt where I have forgotten, there are six or eight plants—his territory would be practically confined to the town of Chanute.

He also said the same thing about these other mills, which I believe was at Louisville, Neb.—that they had a very small territory.

17545 He went on further to say that he thought that would have a tendency to create a monopoly for a mill that was well favored as to location—that is, no competitors near it.

Q. Now, in reference to your interview with Mr. Wecker, of the Marquette Company, will you state what information you requested of Mr. Wecker, and—

A. You mean everything that I requested of him?

Q. No.

Mr. Zimmerman: Well, now—

By Mr. Wooden:

Q. Did you ask him to provide you with any written information, or written records?

A. Yes, I did.

Q. What?

A. I asked him orally for a—to tell me why he did not bid at f.o.b. mill price, and I believe that he had a stenographer present and that she took down some of my questions, I recall it; others he let them pass, but certain ones she took them down and that is one of them that he said he would answer in writing, and not orally. I picked that up from him later. I do not recall the exact date that I picked it up from him.

Then, I believe it was the last day that I was with the Commission—the very last day I was employed by them—I talked with Mr. Wecker again, and at that time I asked him to give me a statement, a written statement, or
17546 a chart, showing how prices were arrived at in all the various counties that he bid in in Illinois, and in Indiana and Iowa.

I don't remember whether I asked him about Missouri or not—I don't remember that—I don't think—I don't know. Anyway, I asked him on those three states, and he said that he would supply me with that information, but I did not get it because I left the Commission that day.

What I wanted to know was what the—for instance, the Cook County, I wanted to know—

Mr. Zimmerman: I object to the witness stating what he wanted to know.

The Witness: I mean, what I asked for.

Mr. Zimmerman: All right.

Trial Examiner Norwood: Yes.

The Witness: I beg your pardon; that was a mistake.

Trial Examiner Norwood: Proceed.

A. (Resumed). I asked him to make up a chart for me showing what mill would govern, what mill's basing point or price would govern the price that, we will say, to Chicago, and then the freight rate from Chicago to that place, and to do that with all of the towns—I mean, all of the counties in Illinois and Indiana; Iowa, too, I think.

By Mr. Wooden:

Q. Did that have any reference to the bids on
17547 highway business in those states?

(Last question read.)

Trial Examiner Norwood: Well, I do not see that that is a leading question. He conferred with this respondent on a number of subjects.

Mr. Zimmerman: He has not said so.

Trial Examiner Norwood: Would you deny to Counsel the right to specify the subject.

Mr. Zimmerman: He has not said so. He has not said that he conferred with him on a number of subjects; he said he went there and asked him for certain information.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: And he has tried to tell what it was that he asked for. Now, Counsel says, "Did that have reference to"—

Trial Examiner Norwood: Well—

Mr. Zimmerman: That is leading and suggestive, 17548 and does attempt to characterize. I think that Counsel should be—

Trial Examiner Norwood: To characterize what?

Mr. Zimmerman: To characterize the whole proceeding. "Did that have reference to." That is a characterization by the witness, not what the witness said to somebody.

Trial examiner Norwood: I do not see that.

17549 Mr. Wooden: It does not indicate what I wanted him to answer, does it?

Mr. Zimmerman: I think it does.

Trial Examiner Norwood: It appears he asked a number of questions of this witness; requested information on a number of subjects.

Mr. Zimmerman: He hasn't said so.

Trial Examiner Norwood: Not in so many words. The objection is overruled.

A. Yes, I, perhaps, was at fault, there. I thought I had stated at the very beginning that all of these people I interviewed, it originally started with the Illinois Lighting in 1933, and that is what all questions I asked Mr. Wecker and Mr. Sunderland, Mr. Tyler, all referred to that.

Trial Examiner Norwood: Read the question.

The Reporter: "Did that have any reference to the bids on highway business in those states?"

Trial Examiner Norwood: Answer that question.

Mr. Zimmerman: He has answered.

A. Yes, it did.

By Mr. Wooden:

Q. I am showing you, Mr. Johnston, papers which have been marked for identification 2604-A to F, inclusive, 2605-A to E, inclusive, and 2606.

Will you look at those and then tell us whether
17550 or not those papers contain information of the sort that you asked Mr. Wecker to supply?"

17551 Trial Examiner Norwood: I shall sustain the objection to that, for the time being.

(Addressing the witness.) Tell us what those papers are.

The Witness: This paper pertains to the state of Indiana State Highway Department.

Trial Examiner Norwood: What is the number on that?

The Witness: 2605-A, from A to E.

17552 Trial Examiner Norwood: Where did you get it?

The Witness: I just had it handed to me. I never saw this before.

17553 The Witness: Your Honor, I would like to make a correction to that statement.

I have seen these before. Mr. Wooden showed them to me several days ago, and asked me if I saw them, but I didn't see them back in 1933.

Mr. Wooden: I was going to bring all this out in a minute.

Trial Examiner Norwood: Read the question.

The Reporter: "Q. I am showing you, Mr. Johnston, papers which have been marked for identification 2604-A to F, inclusive, 2605-A to E, inclusive, and 2606.

"Will you look at those and then tell us whether or not those papers contain information of the sort that you asked Mr. Wecker to supply?"

A. Yes, these figures on here. The towns, the names of the destinations are very obviously the answer to the question that I put to Mr. Wecker.

It contains the information of the character and type that I had asked him to supply me.

By Mr. Wooden:

Q. I believe you said he had agreed to supply that?

A. Yes, he did. He agreed to supply me with this information.

Q. Can you state what the last word you had with Mr. Wecker on the subject was? I mean, the subject of
17554 providing the information.

A. Yes. As I said before, I asked Mr. Wecker if he would make up a chart showing the names of all these destinations and the names of the mills and the freight rates and base price and what not, and he agreed to supply me with it, and I have forgotten what the arrangement was;

either he was going to mail it to me, or I was to come back and get it. That is not clear in my memory, now.

Anyway, I know he offered to get it up for me.

Q. Did you ever see these papers before you left the employ of the Federal Trade Commission?

A. I never did.

Q. Do you know anything about the handwriting that appears in the upper right-hand corner of these papers?

A. The note in this right-hand corner bears the initials "C.M.J." but it is not my writing and I haven't any idea who wrote it.

Mr. Wooden: Mr. Zimmerman, I propose offering these exhibits at this time if you will agree that they were furnished by Mr. Wecker to some representative of the Federal Trade Commission, or to the Commission itself, its office, pursuant to Mr. Johnston's request on Mr. Wecker for such information.

Mr. Zimmerman: May I ask Counsel what Counsel expects these documents would tend to prove?

17555 Mr. Wooden: What the witness has already testified to; namely, that in submitting the bids on highway business to those states certain basing points were taken into account.

Mr. Zimmerman: Well, of course, you wouldn't expect me to agree to that?

Mr. Wooden: This is just merely a question of the source and basis of these papers, whether they came from the company

17556 Mr. Wooden: We can go further with it and find out whose handwriting it is on here that indicates that it was obtained from Mr. Wecker, and the date that this witness says is not his.

17559 Mr. Zimmerman: I will return for the record Commission's Exhibits 2604-A to F, and 2605-A to E, and 2606, which have been marked so for identification.

And with reference to Mr. Wooden's request that I enter into some kind of an agreement as to these being received either from Mr. Wecker or from the Marquette Company, I did endeavor to make some investigation of that subject matter when we were in Kansas City, and I used a good part of the noon hour today in trying to get further information about it; but thus far have been unable to get any information which would enable me to agree that they were received from Mr. Wecker.

My suggestion would be this: That Counsel will permit these to ride over until week after next when we get back here. I will make a further investigation, rather completely exhaustively personally during this week, and if it is of importance for Counsel to know before the week is over,—I mean before we come back here,—I will be glad to write him about it so that he will have some days' notice.

17560 Now, that is probably the best I can do at this time.

17561 Mr. Wooden: Would you be willing to do this, Mr. Zimmerman: Let me know the result of your investigation as soon as you can and prior to the resumption of our hearings?

Mr. Zimmerman: Yes, and is this too much to ask of you: Will you make an investigation, also, and let me know the result of your investigation? I don't want to be captious about it, but let us exchange information on it. I don't want to put you to any unnecessary expense at all.

So that it is agreed upon now that between now and the time we will resume we will exchange corre-

17562 spondence and see if we can come to some agreement.

Mr. MacIntyre: If your Honor please, at this time we would like to offer in evidence the following exhibits which have heretofore been marked as Commission's Exhibits, for identification, 1455, 1456, 1457, 1458, 1461, 1462, 1465, 1466, 1470, 1471, 1472, 1473 1474 1475, 1476, 1479, 1480, 1481, 1482, 1483, 1484, 1486-A, B, 1487, 1488, 1489, 1490, and 1491.

In that connection I call your Honor's attention to the fact that 1491 was produced under subpoena by Mr. H. N. Hansen at Cleveland on November 15, 1938; see his testimony at page 10854.

The others that I have cited in the offer are documents produced by Medusa Portland Cement under subpoena duces tecum on November 15, 1938; see record page 10800; witness Frederick Pickford.

17563 These documents relate to, and to some degree supplement the offer of the Commission in its series 1043 as were offered on, I believe, April 7, 1938.

I also call attention to the fact that 1455, a carbon copy of an original 1043-CC.

Commission's Exhibit 1456, a carbon copy of which Exhibit 1043-GG is a typed copy.

Commission's Exhibit 1457 is an original of which 1043-IIII is a photostat of a file carbon copy.

Commission's Exhibit 1483 is a carbon copy of an original letter of which Exhibit 1043-S is a typed copy.

Commission's Exhibit 1486-A and B is a carbon copy of an original of which Exhibit 1043-U and 1043-V is a typed copy.

In that connection, I also want to call your Honor's attention to the testimony of November 15, 1938, at Cleveland, Ohio, witness W. W. Campbell, at page 10922 of the record, and following, concerning identification; that is, supplemental and further identification, of many of the documents included in that offer.

And also the testimony of Mr. D. H. MacFarland, at Cleveland, Ohio, on November 18, 1938, at record pages 11458 and 11584, in which he gave some supplemental and further identification concerning some of the documents in this offer.

17564 Now, if your Honor please, I would also like to offer at this time into evidence the following exhibits which have been marked as Commission's exhibits, for identification:

1965-A and B, 1507, 1512, 1518, 1521, 1523-A and B, 1574-A, 1599, 1600, and the portion of that telegram as appears on the reverse side of 1600.

1607, and with respect to 1607 I want at this time to call your attention to the fact that it is a carbon copy of a letter which appears in the record as 1043-B.

1613, 1614, 1619, 1617, 1624, 1626, 1636, 1643, 1644-A and B, 1675-A and B, 1678, 1701-A and B, 1708, 1710, 1731, 1738, 1743-A and B, 1765-A and B, 1814-A, B, and C.

And, in that connection, offer the handwriting that appears on these documents as identified by witness D. H. MacFarland in his testimony at Cleveland, Ohio, on November 18, 1938, beginning at record page 11584, as well as the other handwriting appearing thereon as identified by other witnesses, including Frederick Pickford on page 10800, and following, and page 11572 and following.

This group of documents included in this last offer was produced under subpoena duces tecum by the witness Frederick Pickford,—that is, all except Exhibits 1965-A and B were produced by him under subpoena duces tecum,
17565 which had been served upon the Medusa Portland Cement Company on November 15, 1938, see record page 10800 and following.

Commission's Exhibits 1965-A and B were produced by the witness Frederick Pickford in response to a subpoena duces tecum served upon the Medusa Portland Cement Company at the hearing in Cleveland on November [illegible] 1938,—see pages 11572 of the record, and following.

As I have stated, these documents all relate to and supplement—not all relate, but relate to and some of them supplement—the documents included in the Commission's offer of last April marked for identification and received as—that is, in the series 1043. I believe that the Respondents have photostats of all of these documents,—at least, it was my understanding in Cleveland at the time that they were produced under the subpoena duces tecum that they had secured photostats of all of the documents after they were marked for identification.

Therefore, the photostats showing the identifying marks,—the Reporter's identifying marks,—and I would suggest in the light of that fact that your Honor take the offer here today under advisement and use these documents for study during the recess period while the Respondents use
17566 their photostat copies explaining any objections that they may care to raise to the offer.

17568 Mr. Wooden: Your Honor, referring to Exhibit 2421, for identification, I understand that Mr. Leisure was to check on that to ascertain whether he could agree that it came from the files of the Lone Star Company in Texas.

Mr. Leisure: When did we discuss that; this week?

Mr. Wooden: Yes; two or three days ago.

Mr. Leisure: Mr. Wooden, our objection, I don't think, went to the question of whether it came from the files. Our objection was it came from a third party.

Mr. Wooden: Yes, I know that, but as far as accounting for or identifying the document itself.

Mr. Leisure: As to its being in the file, I think we said subject to check. We hadn't raised any objection to that.

Mr. Wooden: I thought you wanted to actually check it.

At this time I am offering Commission's Exhibit 2421, for identification, as a document from the files of the Lone Star Company of Texas, and I also offer Exhibits 2434 and 2435 as documents from the files of the Southwestern Portland Cement Company of El Paso, Texas.

Mr. Leisure: What was the number of the second one you just referred to?

17569 Mr. Wooden: 2434 and 2435, and subject to check I offer 2434 as the writing of A. P. Magruder, a salesman of the Southwestern Company at San Angelo, Texas.

I offer 2435 subject to check on the point that it was a writing of Hubert Leibrecht, assistant to the sales manager of the Southwestern Portland Cement Company of El Paso (handing documents to Mr. Leisure).

I might add for information of Counsel, that the testimony in the Texas case shows that those parties were the ones that I have named.

Mr. Leisure: If your Honor pleases, as to this one exhibit, 2421, it appears to be written by the president of some lumbermen's association in Texas, and it says "To all members"; apparently to the members of that association, I would say.

I don't see how the respondents in this case are bound by anything that this gentleman may have written.

As to the other two letters, I object to them as incompetent, irrelevant, and immaterial. They don't prove or tend to prove any of the issues in the case.

Trial Examiner Norwood: Any further objection to those?

Mr. Zimmerman: I haven't seen them.

Mr. MacIntyre: With respect to Commission's Exhibit 2421, it may aid you in your consideration of the
17570 offer on that document by pointing out that Commission's Exhibit 1097-A, B, and C, carries a showing that the writer of this document is a member of the National Retail Lumber Dealers Association of which Mr. Frank Carnahan of Washington, D. C., is executive secretary and manager.

Other exhibits in series 1022 and 204, Commission's Exhibits, clearly show what connection Mr. Carnahan has with George H. Reiter, general manager of the Cement Institute and, of course, the offer of 2390 to 2406 went all over that ground. I believe it is needless to do so again at this time; that is, in so far as it shows connection between the writer of this document, 2421, and the respondents in this case.

Mr. Wooden: Furthermore, Your Honor, there are exhibits already received which show the action of respondents upon the matter covered by this exhibit.

Trial Examiner Norwood: These documents are similar

to the ones I examined yesterday; that is, Commission's Exhibits 2390 to 2406, I think; of a similar nature.

Mr. Leisure: The difficulty I find with Mr. MacIntyre's statement on that, Your Honor, is that the date of that exhibit—may I have the date of that?

Trial Examiner Norwood: April 15, 1935.

17571 Mr. Leisure: Yes. Now that is prior in date to these other exhibits which Mr. MacIntyre says explain the exhibit, so I don't see how it can be connected up in that way.

Trial Examiner Norwood: Well, I shall study that. State all your objections.

Mr. MacIntyre: On this last point raised by Mr. Leisure as to point of time, I would like to refer Your Honor to exhibits between 1900 and 1906 which were introduced and received in evidence in Chicago showing the dates on which meetings were had and policies of distribution discussed between representatives of this National Retail Lumber Dealers Association and affiliated units and Mr. B. H. Rader, a high official and now of the Cement Institute in Chicago.

Mr. Leisure: There must be some limitations, Your Honor. We have already all the railroads in as conspirators; now it seems as if we are having all the lumbermen's associations as conspirators in this case.

There must be some limitations in the trial of a case, it seems to me. Counsel's imagination can't just take in the whole world.

17572 Mr. Wooden: The plain facts are that these parties, such as the railroads and the dealers cooperated with respondent in carrying out some of the things charged against respondent in the complaint.

That makes their acts and statements admissible against respondents.

Mr. Leisure: That brings out the very point I have in mind. The complaint doesn't charge any such conspiracy.

17579 Washington, D. C.,
March 20, 1939.

17633 Trial Examiner Norwood: Now: inasmuch as these objections are stated at length here, and there are quite a number of the exhibits, I shall reserve the ruling on them until Commission's Counsel may look over these objections and make reply—

Mr. Wooden: Of course, Your Honor understands that the third parties to whom Mr. Leisure referred are not, in the view of Counsel for the Commission, genuine third parties, but are in the category of parties who collaborated with and assisted Respondents in carrying out certain of Respondents' objectives.

Trial Examiner Norwood: Yes.

Mr. Wooden: And thereby and therefore made themselves co-conspirators with the Respondents, and as to those the identification, at least of many of those, was made by the persons who actually wrote or received the documents in question.

17634 DR. FRANK A. FETTER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

*Direct Examination by Mr. Wooden.*

17635 I am a retired teacher of economics at Princeton University and have been in the profession of teaching economics from the fall of 1894. I served as professor successively in Indiana University, Stanford University, Cornell and Princeton. I was at Princeton since 1911, going there from Cornell. My economics background in the way of training and education consists of eight years of experience in business. I stopped out during my college course; returned and majored in economics with Professor Jeremiah Jenks and then went to Europe, studied for two years, taking a Doctor's degree at the University of Halle in Prussia, Germany. Then I returned to teach as instructor at Cornell and went successively to these other positions, returning to Cornell in 1901. I have

written a large number of articles and two or three text-
books on the subject of economics. The first was
17636 "Principles of Economics", 1904; then a two vol-
ume work, the first of which was entitled "Economic Principles", 1915; the second, revised in 1922, called "Modern Economic Problems". In 1931 I published the "Masquerade of Monopoly", dealing largely with the basing-point problem. I was secretary and treasurer of the American Economics Association for five years and then somewhat later in 1912 I was president of the organization for one year. During my close association with Professor Jenks at Cornell from 1901 to 1911 my attention was directed to the subject of monopoly, monopoly practices, and I began, particularly, to be interested in the question of delivered prices, and as a result of my interest in that I was invited by Professor John R. Commons to cooperate with him and Professor Ripley in the Pitts-
burgh Basing-Point case in 1923, which we did.
17637 We appeared there as economic advisors for the
Associated States opposing Pittsburgh Plus and I testified in that case.

Q. Is the book that you referred to a while ago called "The Masquerade of Monopoly," did that deal particularly with the basing-point system of pricing?

A. That is the essential theme of the book, and the meaning of the title is not mere play on words, it is a literal description of what I felt to have been the experience with the basing point; that it had successfully eluded discovery and had deceived the public and the country as to its nature.

Mr. Wooden: Your Honor, I at this point would tender Dr. Fetter for acceptance by you as an expert in the general field of economics and with special regard to basing-point systems.

Trial Examiner Norwood: He is so accepted.

By Mr. Wooden:

Q. Dr. Fetter, I am going to put a question to you which will assume certain facts—.

Mr. Zimmerman: Before that is stated, I would like the record to be clear that the Examiner spoke for the Examiner and not for Counsel for the Respondents, in any way. I shouldn't like to be bound by that acceptance.

17638 Trial Examiner Norwood: Counsel speaks for
himself.

Mr. Zimmerman: I didn't want my silence to give consent in any way at all.

Trial Examiner Norwood: Are there any objections to the Doctor being accepted as an expert economist?

Mr. Leisure: We object to it. We will want to develop that on cross-examination.

Trial Examiner Norwood: The objection is overruled. Go ahead.

By Mr. Wooden:

Q. I want to put to you a question, Dr. Fetter—

Mr. Zimmerman: May I say, if the Examiner feels we ought to state our objection in any particular manner before we have had any or taken an opportunity to cross-examine, let the record show that I object on the ground that he hasn't been qualified to express any opinions as an expert on any matter pertaining to the complaint.

Trial Examiner Norwood: Counsel may ask the Doctor questions on the voir dire.

Mr. Zimmerman: I see nothing for me to ask at the moment. He has not been properly qualified, in my opinion, so I am stating my objection on that account, and I won't undertake to qualify him further.

Trial Examiner Norwood: In my opinion he is.

Go ahead.

17639 By Mr. Wooden:

Q. I want to put to you, Dr. Fetter, a question which will assume certain facts to exist in the pricing of cement, and then to ask you a question about those assumed facts.

Let us assume that there is—

Mr. Zimmerman: Can we have a copy of this question, as we did before?

Trial Examiner Norwood: Yes, I think so.

Mr. Wooden: On pages 15621 and 15622 of the record.

Mr. Zimmerman: Is this the same question asked of Dr. Viner?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. Assume that there is a general practice in the cement industry of mills quoting and selling only at delivered prices and of refusing to quote and sell f.o.b. mill.

Assume that some mills and some groups or clusters of

mills are basing points and that some other mills are non-basing points.

Assume that delivered prices are the equivalent of base-point prices plus rail freight from base point to destination and that the lowest combination of base price plus rail freight determines which base-point price will govern at any particular destination.

Assume that when delivered prices are made as
17640 described the delivered prices of all mills become identical at the same destination and that non-basing-point mills match the delivered prices at particular destinations of the basing-point mills.

Assume that rail freight is ordinarily paid by the buyer to the railroad company; is then deducted from the face of the invoice and the balance paid to the seller.

Assume that the mill nets of each non-basing point mill vary between its respective customers depending on the differences in freight to their respective destinations, higher mill nets being received from its nearby customers than from its more distant customers.

Assume, also, that when selling for delivery at destinations governed by other basing-point mills the mill net prices of each basing-point mill also vary between its respective customers depending on the differences in freight to their respective destinations, higher mill nets being received from customers in territory governed by it than from customers in territories governed by other basing-point mills.

Assume, also, that substantial shipments are being regularly made by basing-point mills into the territory governed by other basing points.

Take all of those things together and then tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which
17641 you have become familiar in the course of your studies and experience?

Mr. Leisure: One moment, please.

If Your Honor please, I object to that question as being incompetent, irrelevant, and immaterial, and upon the further ground that it does not correctly state the status of the record, and upon the further ground that the question assumes in itself the issues which are to be proved

in this case, and on the further ground that the question asked the witness to pass upon issues which are reserved to the Commission and the courts, only, are not proper subject matter for an expert witness to give opinion evidence upon.

For all of these grounds I object to the question and I add to the objection that the form of the question, as to whether or not this is similar to something else that the witness has encountered, that renders the question also incompetent, irrelevant, and immaterial.

Mr. Zimmerman: May I add, with the hope I am not in any wise duplicating, and I think I am not, the further objection that the evidence does not prove the facts contained in the hypothetical question in a number of particulars including the statement that "The mills quoting and selling only at delivered prices," and, again, that they "refuse to quote and sell f.o.b. mill."

On the contrary, the evidence shows clearly that
17642 there are scores and scores of cases where they have sold and quoted f.o.b. mill whenever such a price was requested of them; that more than 25 mills filed f.o.b. mill prices during that period when prices were being filed in accordance with the requirements of the code.

They have sold continuously, and still do, some of them; for example, Marquette has continuously sold f.o.b. mill for more than 10 years last past when required to do so by their customer.

It is not true that a mill receives a higher net in its nearby territory, always, than it receives in the territory closer to some other mills and the evidence does not conclusively show that.

17643 Mr. Zimmerman: I haven't intended to state to the last detail in illustrating my objection that the hypothetical question assumes facts which were not in accordance with the record.

I have, I think, pointed out the highlights.

17645 Mr. Zimmerman: I would like to add just this: That the question says, "Assume that some mills and some groups or clusters of mills are basing points and that some other mills are non-basing points." There is no definition for the term "basing point," and without it the term has been used in so many ways in the record that the question is not a fair one and is not a proper hypo-

thetical question without a definition of basing point and basing-point prices.

Mr. Wooden: As a matter of fact, a definition follows immediately after when it defines the delivered price as being the lowest possible combination of basing-point price plus freight.

Mr. Zimmerman: That is not the basing-point definition that has been used by economics in some particulars and not used in connection with the case that the witness referred to as having been a witness in.

Trial Examiner Norwood: Well, in case that is not certain, it may be rendered more certain by subsequent examination.

The objection is overruled, and I will ask the witness to answer the question.

A. If and when such a condition existed, I should say that it did not conform to normal competitive selling methods.

17646 Mr. Zimmerman: That is not an answer to the question, if the Examiner please. The question ended with this: "tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which you have become familiar in your studies and experience."

Now, the answer to that calls for a "yes" or "no," and I think the volunteered statement of the Doctor, while it may be interesting, ought not to be permitted as an answer.

Trial Examiner Norwood: I will permit the witness to answer the question in any way that he wishes, and make any further explanation that he may desire.

By Mr. Wooden:

Q. Is your answer "yes" or "no," Doctor? I think it is rather obvious.

A. My answer is "no."

Q. Do you mean to say that it does not correspond to any competitive method of pricing that you have become familiar with?

17647 Mr. Wooden: The difficulty is that there has been so much interruption and objection that the witness cannot tell—one cannot tell what his "no" means after this time.

Mr. Zimmerman: Oh, no. Then why not ask him plainly what his "no" means?

Mr. Wooden: All right, then, I will ask him, then.

By Mr. Wooden:

Q. What does your answer "no" mean?

17648 A. I mean that the economist puts up a picture of a typical competitive state of affairs, market, where competitive prices result, and this hypothetical question does not present any such a situation.

By Mr. Wooden:

Q. Now, Dr. Fetter, I am going to ask you what, in the economic sense, the wholesale price of cement is, as you understand the basing-point system in the pricing of cement?

17650 Q. Speaking as an economist, Dr. Fetter, what is the wholesale price of cement under the pricing sys-
17651 tem, or pricing method, which I have outlined in that long question?

Mr. Leisure: If Your Honor pleases, I make the same objection to this question, being incompetent, irrelevant, and immaterial, asking the witness to pass upon certain facts, asking him to usurp the functions of the Trade Commission and the courts.

Trial Examiner Norwood: The objection is overruled.

Mr. Leisure (Resuming): And does not tend to prove any issue in this case.

Trial Examiner Norwood: Go ahead.

(Addressing the witness): Do you wish the question read?

The Witness: Yes, please.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. The very essence of my belief regarding the terminology of price, that its being depends upon the context, and I think that in order that my answer should be understood I should indicate what I think would be—

By Mr. Wooden:

Q. All right.

A. —the proper interpretation there.

Q. All right.

A. The word "price," like every other important word in practical life, economics, or law, has a variety of
17652 meanings and shades of meaning, according to the context, and has to be interpreted according to that context.

If I may indicate, as an example, the word "horse" may

be modified by a variety of adjectives, and the adjective changes the fundamental substantive meaning of the word.

We err, often, in assuming that the noun remains the same when we have no adjective. For instance, we may have a race horse, grey horse, and then we may speak of sea horse, a fish that looks a good deal like a horse,—and of a hobby horse, which is a piece of wood that is shaped like a horse, a mere plaything, and the saw horse, and a clothes horse, and so on and so forth.

Mr. Leisure: What is the last horse, please?

The Witness: A clothes horse.

Mr. Wooden: A plain clothes horse.

The Witness: A rack to hang clothes on.

Mr. Leisure: Oh, excuse me.

The Witness: Yes.

A. (Continuing) And there we have the substantive meaning, very greatly modified, sometimes completely changed, and yet in practical life we sort those meanings out by the context, and we would rarely make a mistake regarding the practical application, and yet if we took it literally, if we tried to define the noun, take it literally, we would have nonsense, really.

17653

17655 Trial Examiner Norwood: Read the question previous.

(Previous question read as follows:

Q. Speaking as an economist, Dr. Fetter, what is the wholesale price of cement under the pricing system or pricing method which I have outlined in that long question?")

Trial Examiner Norwood: Now, complete your answer to that question. You have illustrated the different

17656 meanings, the aspects of meanings of words. Now, complete your answer.

A. The word "price," as the economists ordinarily use it, is in quite a different sense from delivered price; consequently, the word would have a different meaning in the different contexts: when referring to a competitive price in a market, the word "price" would have one meaning and when referring to a delivered price under the basing-point system it would have quite a different meaning. The word "delivered" used as an adjective, modifying "price," very materially changes the meaning of the word "price."

The word "price" as applied to a market, priced in and at a market, is a freightless price. It is a price which does not include an element of freight. The word "delivered

price" is a compound term meaning both the price of the cement and the price of freight necessary to transport the cement from the place at which it is sold to the destination.

By Mr. Wooden:

Q. Well, under the description given in my long hypothetical question, of the method of pricing cement, what in that description is the price in an economic sense?

A. Well, I should say there is no price in the ordinary economic sense; you are using the word "price" in a different sense.

Q. What about the portion of the hypothetical
17657 question that refers to variation in mill nets?

I will ask you, in the economic sense, what those mill nets are.

A. I should say that in the economic sense the mill net meant the price of cement after subtracting the price of the freight from the quoted price.

By Mr. Wooden:

Q. If it were stated to you "In the cement industry it is clear that the price of cement is the amount paid by the buyer," would you agree with that statement?

A. The statement is incomplete.

17660 A. I should add the phrase "for cement," the price of cement is the amount paid by the buyer for cement, because a delivered price is the price paid for cement and freight combined, as I indicated.

Mr. Leisure: In view of the answer to the last question, Your Honor, I want to move to strike both the question and the answer on the ground that the answer is not responsive, and the question is incompetent, irrelevant, and immaterial.

17661 Your Honor will observe that through the series of questions of the Counsel, what Counsel has done is to ask the witness a hypothetical question and then, in effect, ask him "now, what about cement?" The witness has attempted to relate the hypothetical question to cement whereas there has been no showing so far he has ever had any practical experience or any experience whatever which would qualify him to answer as to cement and until such groundwork is laid, until such showing is made, I move the question and answer be stricken.

Trial Examiner Norwood: Motion denied.

Q. Dr. Fetter, if the following description were given to you of the basing-point system in cement, quoting?

"Manufacturers customarily and for the purpose of the convenient conduct of their business, maintain a uniform base or factory price so far as the customers of the individual manufacturer are concerned.

"That is to say, the business is conducted on a one-price basis.

"In order, however, to determine the delivered price there must be added to the factory price of a given manufacturer the cost of transportation to the point of delivery."

In your opinion, can such a description be applica-
17662 ble to the sale of cement under the basing-point system at identical delivered prices?

Mr. Leisure: One moment, please, Doctor.

I object to that question again, Your Honor, for it is placed on the basis of a hypothetical question; unless it be shown it does come from the record.

I do not think the Doctor can be asked just any assumed question that Counsel wishes to ask him unless they are based on the facts in this case.

For that reason I object to the question.

Mr. Leisure: And I add, Your Honor, that there has been nothing on the record, so far, showing that the Doctor has had any experience in the sale of cement which would give him the right to answer that question as to cement.

Mr. Zimmerman: And the question assumes facts which are not in accordance with the record.

Mr. Wooden: He is supposed to answer the question under the assumption of the hypothetical question that described and assumed certain facts, for the purpose of his answer, some time ago, and then I put this question to

him and asked him, in his expert judgment, how
17663 those two things can be reconciled, if they can be.

Mr. Zimmerman: Now, then, my objection is further that the question is not complete, and it is impossible, in my opinion, to make a straight record unless each question is complete in itself. If you have two immediately consecutive questions it would be a little simpler, but they are not, and they can't be.

Counsel ought to make his questions complete in themselves.

Mr. Wooden: It was complete in itself. I merely asked

that for the information of Your Honor for the basis and reason for the question.

Trial Examiner Norwood: The objection is overruled.

A. That is not an accurate or complete description of such a basing-point system as was involved in the long hypothetical question.

By Mr. Wooden:

Q. Will you point out wherein it is not complete or accurate?

A. It applies only to those sales made by a basing-point mill within its own controlled territory; the territory which we speak of as controlled by its own basing-point price. It does not apply to the identical delivered prices of any other mills selling into that territory nor to the sales made by the basing-point mill beyond the territory which its base point controls.

17664 Q. In your opinion, Dr. Fetter, are the multiple basing-point cement prices on a one-price basis, in the sense of the statement that I incorporated in my question a moment ago?

17665 A. Only those prices of the basing-point mill when selling within its own controlled territory conform to that definition or description. All other prices are not accurately described; other prices are not accurately described by that statement.

By Mr. Wooden:

Q. Are other prices than those you have just referred to on a one-price basis, in your opinion?

A. I think it is already implied from what I have said they are not on a one-price basis. They involve discrimination; that is, difference of price as far as relates to the customers of the particular mill.

By Mr. Wooden:

Q. Now, Dr. Fetter, assume that this statement were made to you for your consideration as an economist:

"A standardized commodity in the usual acceptance is one of uniform quality in which the ordinary pur-
17666 chaser would have no preference for one unit over another unit. He would use them all indifferently.

"For all practical purposes there is unanimity of opinion among economists that with a standardized commodity and conditions of effective competition there is the strongest sort of tendency to uniform price.

"The opinion is practically unanimous.

"I have made my own observations and also studied the opinions of other authorities.

"Some of the authorities who hold the view that I have just expressed are"—

And then suppose there follow the names of 17 economists in support of that statement.

In your opinion is such a statement accurate, either standing alone or taken into consideration with the methods of pricing cement?

17669 Q. Dr. Fetter, will you state whether or not in your opinion it is a fact that there is unanimity of opinion among economists that for all practical purposes and with a standardized commodity and conditions of effective competition there is the strongest kind of tendency to uniform prices?

A. I think that is a correct statement of the theory as held regarding prices in a specific market of a competitive character, as is indicated in the previous statement.

17671 Q. Dr. Fetter, I omitted to ask you whether or not you had made any special study of the cement industry with reference to the existence or operation of the basing-point system in that industry.

A. I have not been interested in any specific industry as an industry, but I have been interested in the

17672 subject of marketing prices and basing-point prices. In that connection I made a rather extended and very careful study of the record in the former cement case, the 1925 case.

Later I was asked to be a member of the committee in the negotiations regarding cement prices for the T.V.A. and at the invitation of Dr. Morgan I became a member of that committee, well known, no doubt, by every one here, and served on that committee for a matter of several months in connection with Dr. Morgan and Mr. John Treanor, representing the cement industry.

I cannot pretend to be a technical expert either on cement or any other specific industry.

Q. Did you obtain any firsthand knowledge of the method employed in the cement industry for pricing cement during the course of your connections just described?

A. I think they were really not in dispute. It was well understood what the general facts were, which correspond, essentially, with the hypothetical question.

Mr. Leisure: Just a minute. I object to that and move the answer be stricken as not responsive.

Trial Examiner Norwood: Motion denied.

Did you become acquainted with those firsthand facts?

The Witness: In so far as I was able to, and as they bore upon the question that was before this committee.

17673 It was an attempt to arrive at what would be a fair or equitable price for cement for the T.V.A. and the United States Government, and a decision finally was reached on that matter.

Trial Examiner Norwood: Did you make a study of the marketing methods?

The Witness: The marketing methods, of course, were implied, an understanding of the marketing methods was implied in almost every statement made in the discussions of that committee.

By Mr. Wooden:

Q. Dr. Fetter, in connection with your committee work did you discuss any of the methods of marketing and pricing cement with representatives of the industry?

A. Well, Mr. John Treanor, whom I had known previously very well in California, was the only one I recall I came in contact with although there were, I think, in attendance at certain meetings, other representatives. I can't recall just now who they were.

Q. To what extent, if any, is your understanding of the basing-point system in cement based upon information supplied to you by such representatives of the industry as you have just mentioned?

17674 Mr. Zimmerman: There is a further objection to it. There is no showing whatsoever that the basing-point system, such as Dr. Fetter has referred to it, in connection with the Pittsburgh Plus, has ever been used in the cement industry, or that it is now used in the cement industry.

The difficulty about these questions all goes back to the proposition that there has been at no time in any of them even the slightest attempt to define the basing-point system, here, in any way.

Now, then, it has the further objectionable quality in that it goes to the question of somebody who is long since dead and what conversations he may have had with him, which we can't possibly go into here, to save our lives.

Your Honor asked him if he made any study of the mar-

keting methods, and he didn't answer it directly, but he came back and said that was implied. That doesn't amount to a study of the marketing methods, at all.

Trial Examiner Norwood: The objection is overruled.

A. I should say very little. It added little or nothing to my understanding of the methods in the cement
17675 industry as I had gathered them from the study of the records from the Supreme Court.

The national character of the multiple basing-point system in cement was well indicated by the fact that the industry was represented in this negotiation for the price of cement to the T.V.A.—

Mr. Zimmerman: I object to this—

Trial Examiner Norwood: Let him finish.

Mr. Zimmerman: No, sir; I object to this statement in the record. It is purely a volunteered statement and has no place on the record.

Trial Examiner Norwood: Counsel's objection is overruled.

Finish the answer.

The Witness: May I have the last part of my answer as far as I had gone?

(Partial answer read by Reporter.)

A. (Continuing) —in the Tennessee Valley by the president of the Riverside Cement Company of California.

By Mr. Wooden:

Q. Do you remember anything in the course of your contacts with him or any others in the industry during that period when you were on that committee that was different from your previous understanding of the basing-point system in cement?

A. I can recall nothing essential that caused my
17676 understanding to be changed.

Q. Did you learn anything from those gentlemen that was confirmatory of your previous understanding?

A. The industry was, I think it is fair to say, very cooperative in those discussions and submitted very large numbers of figures for the use of the special con-
17677 ference committee. Those, of course, I did not memmorize; but I became acquainted with them at the time, and they were very informing.

17682 Q. Dr. Fetter, what understanding did you have as to the nature of the basing-point system in ce-

ment at the time you served on this committee of T.V.A.?

17683 A. Does that mean before I began to serve on it, or after I had served on it?

By Mr. Wooden:

Q. Make it before and after.

Mr. Brick: Which one?

Mr. Zimmerman: Which one of those?

By Mr. Wooden:

Q. When you went into it, and when you left that committee's service?

A. I am not aware that is an essential that my understanding of it was different before and after serving on the committee. There were many interesting facts came before us, and came to my knowledge, but I am not aware that that changed my understanding of the essential character of the basing-point method in cement as a price-making method, or price-determining method.

Q. Well, what was your understanding of the nature of the basing-point method in cement at that time?

17684 A. Well, that would seem to call for a treatise on this subject of the basing-point in cement.

By Mr. Wooden:

Q. As to the same features of it, as you understood it at that time?

A. Yes, and I think that would be very boresome, and of little account at this point.

Q. I will be glad to shorten it.

A. My—

17685 Trial Examiner Norwood: Wait a moment. Go ahead with your answer.

A. My comment on that will be found in the chapter on "Monopoly" in which I analyzed the results of the case, the Cement Protective Association case.

By Mr. Wooden:

Q. And when was that published?

A. That was published in 1931.

Q. Now, Dr. Fetter, I want to go back to something, a question that I put some time ago, but we got sidetracked on,—and that is whether or not there is unanimity of opinion among economists that with a standardized commodity, in conditions of effective competition, there is a strong tendency to uniform price?

What is your answer to that question?

17686 Q. I believe you agreed in general with that statement?

A. I thought that that was a very good statement of the conception of price in a market, one having not to do with freights or deliveries.

Q. What application, if any, does such a statement have to do with reference to a basing-point system of delivered prices?

A. It has essentially no application because it conceives of a state of facts, situation, that is utterly different from that in a basing-point system.

Q. Will you specify wherein it is different?

A. Would you like to have me point out from the side of the basing-point system?

Q. Either or both, compare those two things.

A. In a market as described there, there is effective competition. That is a statement that is made; and in the basing-point system there is not effective competition. In the economist's typical or ideal market all buyers and sellers of that region are gathered together in one market, there is free access to the market by the buyers. They are allowed to assemble at one place. They can become acquainted with the prevailing price. They can and all do buy at substantially the same price. There is a tendency for the price in that market to be uniform at the place for all buyers, no matter from what distance they

come, and no matter what destination the goods

17687 are to be conveyed.

In all those respects the picture there of the uniform price in the typical economist's market is very different from that presented by a system of identical delivered prices under the basing-point system.

Mr. Leisure: Just a moment, Mr. Wooden.

Again, Your Honor, I move to strike out the last question and answer.

The witness in answering the question has attempted to pass upon the very issues that are to be decided by the Federal Trade Commission and the courts in this case. I do not understand that to be the purpose of expert testimony.

Mr. Wooden: Well, expert testimony is for the purpose of advising the Tribunal with respect to the very issues that the Tribunal itself is to decide.

Mr. Leisure: Not legal issues, Mr. Wooden.

Trial Examiner Norwood: No, decide the facts, but

Mr. Wooden: The economic—

Trial Examiner Norwood: —he may give us his opinion on the basic facts—

Mr. Zimmerman: There is a very serious question as to whether that is proper or not.

17688 Trial Examiner Norwood: —if they are established.

Mr. Zimmerman: There is a very serious question whether it is proper for him to even express such an opinion, unless Counsel for the Commission here feels that this complaint involves principally, or as one of the major parts of it, whether or not the marketing system in the cement industry is economically for the public good, or otherwise, and I am sure he does not.

Trial Examiner Norwood: I think that a question like the Supreme Court referred to in the Schechter case—

Mr. Zimmerman: You certainly do not in that.

Mr. Wooden: As to whether it is competitive or not?

Mr. Zimmerman: Only competitive is all that—

Trial Examiner Norwood: Wait a moment.

—where they said it is hard to define, but the distinction is clear—it is hard to define as to just what opinions they may express, but the distinction is rather clear.

Read the question and answer.

(Last question and answer read by Reporter.)

Trial Examiner Norwood: The motion to strike is denied.

17689 Q. Are there such markets in the typical economist's market that you refer to, in existence, Doctor?

A. A scientific ideal is never fully realized in anything, but in our regularly organized markets for stocks, securities, and produce, and physical products, they are very closely approximated.

Q. When you speak of produce, what do you have in minds?

A. Oh, wheat, corn, cotton, live stock, and so forth.

Q. In the typical economist's market that you speak of is there any tendency for the prices to remain uniform over considerable periods of time?

A. No, I think it is one of the criteria that economists would take that prices in a market tend to be fairly flexible over a period of time, I would say.

Q. What period of time do you have in mind there?

A. In the perfectly organized and completest competitive market, of course they vary from moment to moment, at any one moment a seller is ready to sell to anybody at that price, but he may, of course, decide not to sell, where reserve valuations may be greater than the going price, and then temporarily he would retire and allow the others to sell at the prices which they were willing to take, and then, in turn, if he had reasons of various kinds, an excessive supply, or reduction of his costs, or whatever it might be, he might offer at less, so that the conception of
17690 a uniform price must not be applied over a period of time, it is only a conception of a moment of time with the price itself varying, or the prices varying, in a succession like a cinematic picture.

17691 Washington, D. C.,
March 21, 1939.

17693 Dr. Frank A. Fetter thereupon resumed the stand and testified further as follows:

*Direct Examination (Continued.)*

By Mr. Wooden:

Q. Dr. Fetter, at or near the close of your testimony yesterday you spoke of inflexibility of prices being an indication of lack of competition; do you remember that?

A. I think so, yes.

Q. If it should appear in the evidence in this
17694 case that a number of the basing-point prices had been in effect without change for a period extending from January, 1933, to as late as June, 1938, what would you say, as an economist, to the indications of those facts?

A. Such rigid prices, I think, would be taken by any economist as indicating a lack of the normal or usual competitive forces at work. During all that time, the delivered price to the buyers in every portion of the territory of those mills, whose prices controlled those areas, would have remained unchanged. That would be despite all of the various territorial changes in demand, increased use of cement in highways, public buildings, bridges, and reservoirs, and so forth, changing very greatly the relative demand for cement in those different areas.

Q. If it should appear in evidence in this case that other basing-point prices had remained in effect without change between July, 1933, and June, 1938, would your answer be the same?

A. Yes. The longer the period, of course, the more aggravated, you might say, was the evidence of lack of competitive forces at work.

Q. If it should appear that still other basing-point prices had remained in effect without change from 1935 to June, 1938, what would your statement be? Would it be any different from what you have made?

17695 A. No. Even rigidity of a few months would be very extraordinary in any industry where there were competitive conditions.

Q. If it should appear in evidence in this case that in July, 1932, a number of basing-point prices were advanced to the extent of 35 or 40 cents a barrel, as an economist, familiar with conditions as of that time, what would be your opinion upon the competitive conditions that existed?

A. It, of course, would seem to be an extraordinary phenomenon that prices should increase to the amount of 25, 40, nearly 50 percent in an industry at the very depth of the depression when the general average of prices were at the very lowest in the business cycle, and when the prices of many competitive articles were exceedingly depressed.

Q. If it should appear, Dr. Fetter, that in July,

17696 1932, the price of some basing points were increased from 85 cents to $1.25 a barrel, what would be your economic reaction to that increase?

A. My answer covers that. Of course, that would be 40 cents a barrel, and nearly 50 percent increase on the base of 85.

Q. If it were stated that the basing-point prices prior to July, 1932, were abnormally low, would that make any difference in your answers that you have just made?

A. No, I think that would not affect the answer.

Q. Why not?

A. Because the ability to raise prices that amount in the very depth of the depression of prices, general prices, is indicative of a power of control over prices.

There were many other commodities that were equally depressed in which no such increase either in absolute amount in cents or percents occurred, or, you might say, could occur in the very nature of things.

Q. Now, yesterday, you were giving us an analysis of the terminology of prices, and gave us the analogy of certain adjectives applied to the word "horse."

Can you give any similar illustrations to the qualification of the word "price" as it has been used in the cement industry?

17697 Mr. Wooden: The witness, Your Honor, has shown a long study on his part of the cement industry, including a detailed study of the records and opinions in the old case against the Cement Association.

He has had close contacts with the industry at various times; he has written a book that includes some analysis of the cement industry pricing methods, and he has in addition to that answered a long hypothetical question that contained a number of references to the word "prices."

Trial Examiner Norwood: I think that the record shows that.

17700 A. There are many modifications of the word "price" resulting from adjectives associated with it. The expression "bid price" or "offer price" is, in my judgment, not a real price at all. It represents what either a buyer or a seller, respectively, would like to have the price. Until actually a sale is made there is no price so that that is an example of the modification of the meaning of price.

It is merely a quotation and, yet, I think it is a proper use of the term. I am not criticizing the use of the term as a bid or offer.

Similarly, we may have the expression "destination price" or "delivered price," and delivered price may also have a further modifier as "identical delivered price." There it applies distinctly to the basing-point practice. You may have delivered prices that are not identical delivered prices where the basing-point practice is not being followed and the context in which we would discuss the matter of discrimination relates to the price of cement alone.

If we are dealing with an industry that produces and sells cement and does not produce and sell transportation, that is not its business, it does not own the plant,

17701 it does not conduct a railroad industry; then, in connection with any matter of discrimination, it would be the actual price, net realized price obtained by the industry in the sale of cement.

By Mr. Wooden:

Q. Is your understanding of actual net realized price the same as what it is sometimes referred to as mill net?

A. Yes, and in reading literature of the industry I have found very frequent use of the term by the industry itself in that sense.

When they submit their statistics to the public where their purpose is to show how cheaply cement is sold it is always the net realized price or the average net realized price, as the case may be.

17703 Q. Dr. Fetter, if you were asked what is the actual price, the actual or true price of cement under the basing-point system of identical delivered prices, what would you say?

17704 A. In the matters in which the economist is inter-
17705 ested as to price it is the actual price of cement received by the cement company and paid for cement by the buyer, not including freight, that the economist would be interested in.

17706 Q. Dr. Fetter, are you familiar with the literature of the economic writers on the subject of the tendency of prices to be uniform in a competitive market?

A. Yes, we referred to that yesterday in connection with the testimony of Professor Adams, and I said that I thought that he made a very good statement of the kind of prices and uniformity of prices that was in the minds of the economist whom he cited,—quoted.

Q. Can you name any of those whom he cited in support of his view?

A. The oldest of them was John Stewart Mill whose work was published in 1848, and he included some 15 American writers ranging from Francis A. Walker, I believe, as the first, down to contemporary writers, Dausig, Seligman, Seager, and myself, and others.

Q. You were included, yourself, were you?

A. Yes, I was mentioned,—not cited by page reference.

17708 Q. Dr. Fetter, are you familiar with the writings of the various economists whom you have named on the subject of the tendency of prices to be uniform in a competitive market?

Mr. Leisure: Now, I object to this. This again is going into that same field of attempting to develop a picture that was developed in the old cement case, and Counsel is

persisting against today, going back to the same
17709 subject, and he is now asking him about those men who were named by Dr. Adams in the old case, and I object to it.

Trial Examiner Norwood: Well, he may lay down a basis for his question as to what the consensus of opinion is. If he is doing that, the question is not objectionable.

Mr. Leisure: He can ask him the very simple question.

Trial Examiner Norwood: Yes.

Mr. Leisure: And Your Honor directed him to do that.

Trial Examiner Norwood: Yes, I think so.

Mr. Leisure: It has not been followed at all. He is tying it up to the old case in every question.

Trial Examiner Norwood: I think so.

Mr. Wooden: Cannot I lay a broader foundation for that question. Just to avoid the objection I went back and brought it up in this way.

Trial Examiner Norwood: Why do you not ask him if he knows the consensus of opinion, and, if so, what it is.

Mr. Leisure: And who are they? Anyone could do that.

Trial Examiner Norwood: And no further basis
17710 is necessary unless it is attacked.

Mr. Wooden: But I prefer to state and assume that the writers have represented a pretty fair and complete cross-section of the economic opinion on the subject, and I am asking him if he is familiar with the writings of those people on that subject.

Trial Examiner Norwood: Well, he cannot give those opinions.

Mr. Wooden: I asked him if he was familiar with them.

Trial Examiner Norwood: He may give the consensus of opinion.

The objection is sustained to that question.

By Mr. Wooden:

Q. Dr. Fetter, are you familiar with the consensus of opinion, among economic writers on the subject of the tendency of prices to be uniform in a competitive market?

A. I have examined at one time or another the writings of a very large number of economists on that subject, and it is the general consensus that in a typical market, at a definite local place, without inclusion of freight, that the rule holds that there is a tendency towards uniformity of price in that market.

Q. Now, in your opinion, being familiar with the writings of economists on that point, did they have any
17711 reference in such writings to identity of destination prices?

Mr. Leisure: I object to the question.

Trial Examiner Norwood: Sustained.

You will have to get those other economists here if you are going to put their opinions in evidence.

Mr. Wooden: You cannot have one economist give an opinion about another economist's writings, or other economists' opinions?

Trial Examiner Norwood: He can say whether he thinks they are good or bad, or whether he bases his opinion on them. He cannot say what those opinions are.

Mr. Wooden: I had supposed, your Honor, that once an expert was permitted to qualify and give testimony, including his opinions upon a given subject, that he could discuss the opinions of other people as well on that subject, as a basis for his opinion, and to make his own opinion stand out.

Trial Examiner Norwood: He may discuss them if they are in evidence, but not otherwise.

Mr. Wooden: Well, I had supposed that an expert witness could go into the whole field of his experience and not be confined to merely what is in evidence.

Trial Examiner Norwood: He cannot put their opinions in evidence himself and then discuss them.

By Mr. Wooden:

17712 Q. Well, Dr. Fetter, in your opinion, does the statement that prices tend to be uniform in a competitive market have any relationship to the identity of destination prices under a basing-point system?

A. I can speak about my own discussion of the subject of tendency towards uniform price as being the mark of a normal competitive market, and I am sure that in the case of my own writings up to 1915, and in any other economic literature with which I am acquainted, that the whole discussion was with reference not to the delivered prices but to definite local prices in a local market.

17713 Q. Do you know, Dr. Fetter, of any economic writer who has taken the position that it is the tendency of prices to be identical at destination under competitive conditions?

A. I do not.

By Mr. Wooden:

Q. If there had been such do you think you would know it?

A. I think so.

17715 Q. Dr. Fetter, do you see any opportunity under the basing-point system as you understand it for 17716 a buyer to shop around in the expectation of getting a lower price?

A. The very meaning of the word "identical delivered prices" is such that when and if a system of basing-point prices is in operation it is utterly futile for any prospective buyer to shop around. He might try it once, 17717 foolishly, but if prices are identical at destinations it is utterly useless for him to inquire. He knows that he will get the same quotation from every mill.

That is the very essence of the basing-point practice when and if it is in operation.

17718 By Mr. Wooden:

Q. Dr. Fetter, in your opinion is it an accurate statement that in case of standardized products sold at wholesale to fully informed professional buyers that uniformity of price will inevitably result from active, free, and unrestrained competition?

A. I think that is a correct statement when the latter part of it is fully taken into account, which implies the presence of full, active competition.

Q. Do you consider it an inevitable result?

A. Well, as we discussed yesterday, I believe that the uniformity of price results in a market is rather a tendency than a complete uniformity; there is uniformity in the treatment of sellers by each buyer—that is, it is difficult to a seller to whom he sells at a certain price.

17719 Mr. Wooden: Read that answer again, please.

(Answer re-read by Reporter.)

A. No. Of course, that is reversed—uniformity in the treatment of buyers by each seller.

Q. All right.

A. There is not uniformity in the time sense. Again, we spoke of that yesterday. There is a fluctuation of price through time, but theoretically considered there is a single price at an instant of time. It is, however, I think, recognized, in all this discussion, that actually within a physical market there may at times be excitement, so that sales

would be made at a distance of 50 feet from each other that were not fully and completely uniform in price.

Q. What, if any application does the question I
17720 asked a moment ago, and your answer, have to the basing-point system of identical delivered prices?

Q. Make clear in your answer, Doctor, what you understand by my question.

A. I attempted to answer the question as to uniform price in a market where there was full and free competition.

By Mr. Wooden:

Q. My last question was whether your answer and the question to which it was a reply had any, and, if so, what application to the basing-point system of identical delivered prices?

A. It has little, if any, application, because under
17721 the basing-point system there is not a true market with two-sided competition with free access to the market by buyers, and a delivery of goods at the place.

Q. If it were claimed that when the basing-point system is used there is an independent market price at each destination determined separately, and that the local price at destination the seller discovers, if he can, by diligent inquiry at a multitude of destinations and then exactly matches those destination prices, what is your opinion of such a claim?

A. If your claim were true and you should find a variety of independently determined prices of 50 or 100 destinations all over the country, whatever be the number—if these were separate markets where the forces of supply
17722 and demand were operating there were local influences, and the prices arrived at would have a certain independence. They could not, of course, diverge more than by the local freight between destinations, but as the local freight rate is very considerable for mileage, that would permit a very considerable variation in the local prices even of destinations a few miles apart, but that, of course, is utterly inconsistent with the conception of the basing-point practice, because in that the identical delivered prices of 50 or 100 destinations all conform to a formula and, mathematically, if 50 or 100 prices all fit into a definite formula it, of course, is evident that they cannot be independently locally determined prices.

By Mr. Wooden:

Q. Under the basing-point system of identical delivered prices where is the market, in an economic sense?

A. There is no market in the economic sense.

Q. Will you explain what you mean?

A. A place where buyers and sellers can freely come together and where there is independence of action on the part of the seller; where the bids and offers are independently made, and where we have a market price arrived at by the independent competitive action of the various traders in the market.

Q. If the various destinations be considered as separate markets, what is the probability, in your opinion, that the destination prices at 50 or 90 or 100 different des-
17723 tinations would fit into the formula based on one mill base price?

A. I think anyone's common sense would tell him that it would be most highly improbable. These inde-
17724 pendently determined prices would be independent variables. You would have 50 or 100 different facts, so to speak, figures, independently determined, and for them to fit into the formula of the basing-point practice would be miraculous.

Q. Dr. Fetter, if the following statement were made of the way sellers succeeded in quoting identical delivered prices on sealed bids—I will ask you a question:

Usually the competitor has announced this price, that is, his destination price to his own customers, and it soon becomes a matter of general knowledge, the producer assumes that pursuant to long-established trading usage each of his competitors will normally calculate his destination price by the same simple process that he, himself, uses.
17725 The producer can usually determine the figures used by his competitors in calculating their own destination prices by subtracting known transportation rates from several known destination prices of any given competitor.

Now, to what extent does that correspond to your understanding of any portion of the basing-point system?

A. I would take that as a fairly good statement, as far as it goes, of what happens under the basing-point system, as I understand it. It is defective in not going far enough. It assumes that there can be and is great uncertainty about it. It assumes that this is something that has to be ascertained by fine detective work, or by very shrewd guesses;

whereas, I think it is a matter of most common knowledge that when and if a basing-point practice is in vogue everybody knows, after a very short time, just what the destination price at each destination will be, until a change in some base price occurs, which may be very rare, or until some change in the official freight.

By Mr. Wooden:

Q. As an economist, can you reconcile the state-
17726 ment that you say is a fair statement of the basing-point system, so far as it goes, with any claim that the delivered prices at given destinations are determined by separate inquiry at separate destinations?

17727 A. What I have already said, I think I have clearly indicated, that the two things are inconsistent. If the prices at each one, the various destinations, are independently determined, as in a separate market, they cannot be inferred by calculating back to a basing point from the knowledge of two or three destination points, as is implied in the later explanation.

17729 Q. Dr. Fetter, if it appeared in evidence in this case that in various sets of sealed bids where a number of bidders, say, 12 or more, bid at over a hundred destinations in a State total bids of around 2,000 in number, and that identical bids corresponding to the basing-point formula were submitted in more than 99 percent of those destinations, and that some of the slight departures from that formula were explainable as due to clerical errors, what is the probability of such a result if the bids were made independent?

17730 A. Such identity of bids is inconsistent with the idea that each of those destinations is a separate market, but as to the degree of probability, I am quite in accord with the objection; I am not a professional mathematician and I wouldn't attempt to estimate in mathematical terms what that would be.

By Mr. Wooden:

Q. You think that is a question for a mathematician?

A. I think it would be a subject to the theory of probabilities; a problem for the theory of probabilities.

Q. If it should appear in the record of this case that until some time about 1902 imported cement was
17731 generally sold f.o.b. dock and domestic cement at an f.o.b. mill price with the buyer paying the freight,

and that about that date the forces of competition in cement shifted from the site of the earlier mills which were all located in one region to the places of destination, and that the destination thereafter became the market place where the competitive forces converged, in your opinion could a change thus described be a historical development taking place gradually through the working of impersonal economic forces?

A. Such a change as that is not evolutionary, it is revolutionary. It is a change which, according to the statement of the hypothetical question, occurred in a very short time. It was a change from a mill base price to a system of basing-point prices.

It might, of course, easily be preceded by a certain period of cut-throat, sporadic discrimination, but that is not, I take it, exactly evolutionary.

By Mr. Wooden:

17732 Q. As to the basing-point system where do the forces of competition converge?

A. In the long run and in the very real sense of the term they must converge upon the mill, and the system of pricing that is in vogue will, of course, determine somewhat the advantages or disadvantages, relatively, of different locations; one mill perhaps having a relatively greater advantage under one system of pricing and another mill, perhaps, under another system, but in the long run competition is between enterprises to determine whether or not under the existing set-up, whatever it may, natural or artificial, they are able to make money.

By Mr. Wooden:

Q. If it were claimed that the method of selling at identical delivered prices results in effective competition and that all producers at a given destination must meet competition by matching the lowest price quoted at that destination, what is your opinion of the economic

17733 soundness of such a claim?

17734 A. May I ask whether the question is not a bit confused? It said "all producers at a destination must meet."

By Mr. Wooden:

Q. Well, let us—

A. Is not the phrase "all producers at a given destination"?

Q. That is the way I have it, whether it is in error or not.

A. "At a given destination" modifies the latter part.

Q. Yes.

A. Rather than the term "producers," does it not?

17735 Q. I may have copied it wrong from the answer; that is the way I have it.

Trial Examiner Norwood: If it were "all producers selling at a given destination"?

The Witness: Yes, that is what I mean.

Trial Examiner Norwood: Answer it in that sense.

The Witness: Yes.

A. Well, of course, my opinion of the whole system is that it is not a competitive system, and, in that statement I think the essential fallacy and confusion is contained in the expression "to meet competition."

The phrase "to meet competition" is another of the many phrases in economics, and in law, which are more or less ambiguous. I think I might speak of the fundamental meaning of the word "meet" here.

In its most general meaning, I think all would agree it means for the person to come into the presence of another person, or to meet up with another person, and there are two ways well recognized in the definitions in the dictionaries. One is in a friendly way, and the other is in a hostile way. So we may meet with friends, and we may also meet with enemies. We may meet with good fortune, and we may meet with defeat, or with failure. And the term "to meet competition" may be used in the present agreeable way, meeting competitors in order to

17736 bring about an understanding, or agreement.

That was what was referred to in the very often quoted statement of Adam Smith, that people of the same trade seldom meet together, but the conversation turns upon—the conversation ends in a conspiracy against the public or in some contrivance to raise prices.

Trial Examiner Norwood: You distinguish between meeting competition and meeting a price?

The Witness: Yes. I think that there is a play on words there, that we meet competition when we meet with competitors, and agree with them, and do exactly the same that they do; whereas, meeting competition in the sense of really competing means that we meet competitors and

try to get business that they have and try to keep the business that we have, and—

Trial Examiner Norwood: Would not you meet competition by making a lower price than they would?

The Witness: If we have an advantage in a certain location, and the other man comes in and matches our price and begins to take away a part of our business, we are not competing if we allow him to do it. If we are able to undersell him. Mere matching of prices in that sense is not competing. Where there are differences in the geographical location and in the conditions of production and other advantages.

17737 Trial Examiner Norwood: Then, sometimes the meeting of the same price would be meeting competition, and other times it would not?

The Witness: Yes, it might be,—it might be.

By Mr. Wooden:

Q. Can you give any explanation, Doctor Fetter, of meeting competition where sellers would not be really competing, say, meeting competition?

A. Well, I think a simple illustration might make clear what I have in mind:

Supposing there are four men running a mile race, and they agree in advance that each one is to set the pace for a quarter of a mile, and the other three during that quarter of a mile are to keep just even with him and never to out run him. So, in turn, they take the lead, and at the end of the mile we are likely to have a pretty slow race. There would not have been competition in the running of that mile.

Similarly—

Q. Do you have any further illustrations?

A. Similarly, I remember a matter which occurred in my boyhood in the neighborhood, in the bidding of bond houses for municipal bonds, when it was shown that these bond houses got together and agreed which one was to make the favored bid and the others were to abstain from bidding, and put up the appearance of a bid.

17739 A. (Continuing.) In the basing-point practice there is little, if anything, that can be called price competition, but there is a certain sort of price-raising competition often referred to. That is the very highly expensive method, in selling, competition in the sacrifice of

mill nets, in order to reach distant points, and so forth, none of which sorts of competition result in lowering the price paid by the consumer, in the areas of controlled prices, so that the term "competition" can be again defined as price, modified, I mean, and explained as price competition, or as competition in other respects than in price.

Q. In your opinion, is it meeting competition for all mills to raise their delivered prices when the basing-point mill in that area raises its base price?

17740 Mr. Leisure: I object to that question as not being taken from the record.

Trial Examiner Norwood: The objection is overruled. There was testimony to that effect.

A. That is plainly playing with words. The term "meeting competition" is, so far as I know, not a technical economic theoretical term, but it has a semi-popular meaning, and that meaning is trying to retain an advantage that you have, or to get an advantage that you do not have, striving for it, exerting an effort for it, and if an outside mill could afford to sell before the base price was raised it can still better afford to sell after the base price is raised, and we should expect something in the matter of price shading, but if and when the basing-point system is in vogue that does not occur.

By Mr. Wooden:

Q. Is your answer to my question, then, "yes" or "no," or is it capable of a "yes" or "no" answer?

A. Well, I don't—

Q. Do you want the question read?

A. Yes.

17741 Q. Do you agree, Dr. Fetter, that whether free competition under particular circumstances would result in a uniformity of price is a matter not of law but of economics?

The witness: Indeed, that would be my answer,

17742 it is both.

The Witness: In truth, I think every one in this room, with his varied training, recognizes that the sharp division between economics and law in these matters is rather artificial; that a lawyer has to know a considerable amount of the fundamental principles of economics in order to apply his law, and the economist at least must

know the general trend of legal legislation and opin-
17743 ion in order to have any intelligent opinion about current economic problems.

Q. Dr. Fetter, if you found that a company whose mill would net its maximum or full base price at certain destinations, did not bid at those destinations while, at the same time, bidding at other destinations where it would net considerably less, could that condition be explained in your opinion as normally competitive behavior?

17744 A. No, that would be very strange behavior if competition were at work.

By Mr. Wooden:

Q. Will you explain your answer as to why it would be?

A. The simplest principle of merchandising is to buy in a cheaper and sell in a dearer market, and when a seller refrains, if he refrains from selling where he would get a higher price and yet sells where he would get a lower price in the sense of the net realized, it would appear to be an anomolous behavior.

By Mr. Wooden:

Q. In what way could a mill compete in price instead of merely matching prices with a competitor who came
17745 into his territory where he has a marked freight advantage and cut his own regular uniform price?

A. The last part refers to the competitor from outside?

By Mr. Wooden:

Q. Yes.

A. The mill in the invaded territory could reduce his mill price or he could reduce the price to the customer on the sale that he was about to lose to the invading competitor.

Q. If it should appear in this record that a large part of the cement industry is concentrated in the hands of a few large companies which owned approximately one-third of the mills and produced approximately 40 percent of the capacity in the United States, would such a showing have any significance to you as to the maintenance of the basing-point system?

17746 A. It seems to me evident that such a concentration of financial control would greatly facilitate the maintenance of any system of pricing that was adopted by an industry. I could not say that, abstractly, a basing-

point system might not be maintained by completely independent single mills, but certainly the maintenance of that or any other system of pricing adopted by an industry is great facilitated by such concentration of ownership.

17747 In the first place, it gives a very much smaller number of competing sellers, because merging of ownership under one financial control is complete elimination of price competition between the units that compose the single merger, and, further, any system of pricing has to be policed.

Even the system of free competition has to be policed by some public authorities, and that always has been true, and an artificial system of pricing such as the basing-point system has to be policed by the industry and, very evidently, the concentration of ownership and great financial power enables that policing to be done much more effectively and easily.

The whole conception of fighting ships and fighting mills is very familiar to anybody who has studied the history of price methods in the last half century.

Trial Examiner Norwood: Would that set-up be more conducive to price enforcement than to price agreement?

The Witness: Well, Your Honor, I should say I see no particular distinction. I think it would tend toward both. I mean, I see no particular difference in the influence. It would probably facilitate both.

By Mr. Wooden:

Q. If it should appear, Dr. Fetter, that those relatively few large companies were basing-point mills, would your answer be any different than what it was?

17748 A. I hardly see how I would alter it. There has to be some basing-point mill in any basing-point system, whether it is one or many, and I think the power to discipline independent mills that either have or have not a base price of their own is perhaps more important than the power to fix its own base price that is in the industry of a large corporation.

17749 Q. Dr. Fetter, if the statement were made to you that in marketing a standard and heavy commodity like cement, it is possible to meet competition only by quoting destination prices; what would be your opinion as an economist upon such a statement?

A. That it was erroneous.

17750 Q. Will you specify wherein you consider it erroneous?

A. It is clearly possible to meet competition by reducing base prices, and that is done in many industries, and has been the norm until lately in all industries.

Q. As an economist, in your opinion what puts an upper limit to base prices under the existing practice?

A. As I see it, the limit is placed by the general monopoly principle of charging what the traffic will bear. The raising of the mill's base price does not cut the mill out of sales; does not allocate business at all, under this principle of identical delivered prices.

I might say the proof of that is in the existence of non-basing-point mills which is simply to be conceived of as base-point mills with a mill base so high that they
17751 control no territory yet they are able to compete under this principle, as the word "compete" is used in quotation marks, exactly as well every place as they did before.

By Mr. Wooden:

Q. If it should appear in this record that less than 50 percent of sales of a number of basing-point mills were made at their own basing-point prices, and that the remainder of their sales were made at lower mill nets, some of them as much as 60 or 70 cents a barrel lower than their own basing-point prices, what, if anything, would that indicate to you as an economist as to the average level of such basing-point prices?

Mr. Leisure: I object to that question as incompetent, irrelevant, and immaterial, and upon the further ground that it does not correctly set forth the testimony in this case or the record.

Trial Examiner Norwood: The objection is overruled.

A. It would indicate that the base price must be decidedly high to permit such large deductions and such a great difference between the base price and the net realized price.

By Mr. Wooden:

Q. I am showing you now Commission's Exhibit No. 1112, which is a statement published by the Lone Star Cement Company describing the method of pricing employed by that Company and how its base is made up.

I am referring to page 23 of that exhibit; its base
17752 price being made up of various items of cost plus reasonable profits on its investment and then the

statement is made that "that base price plus the transportation charges would constitute the delivered price in every market if we had no competition."

Will you differentiate, Doctor, if you can, between that statement and what you have referred to in some of your previous answers, referred to as a monopolistic price?

A. On the face of it the statement admits that it is a monopolistic price, because it is a price made if they had no competition, and, as related to my last answer about the height of base prices, it is evident that if the average of realized prices is so far below the base price that the base price must be higher than enough to keep the mills running, whereas, in ordinary competitive price there is a pretty close relation between ordinary average general cost and the price that is received by the mill if it is successful in operating.

Q. If the statement were made to you that to have f.o.b. mill prices would cause a drastic shrinkage in the market of each mill, and to that extent would reduce competition, what is your opinion as to the economic soundness of that proposition?

17753 A. I think that is a rather confused statement, so far as it means, as it appears to mean, in the first part, that there would be a reduction in the area over which the product of a given mill would be distributed, that seems to be correct; but if it means that the mills generally are increasing their output it is an evident absurdity, selling over into each other's territory at higher prices than would prevail under competition does not increase the total output of cement, or of any other product in the United States. To the extent that the base price is higher than would prevail under competition, it, of course, reduces the total amount of the goods sold, because of the cutting off of consumers' demands.

By Mr. Wooden:

Q. If the statement were made to you that f.o.b. mill prices would guarantee to each mill or group of mills a zone where monopolistic power would prevail, what would you say as to the economic soundness of that proposition?

Mr. Leisure: I object to that question as improper, and as incompetent, irrelevant, and immaterial.

Trial Examiner Norwood. Overruled.

17754 A. The isolated position of the mills in certain industries create in itself a monopolistic situation. The real question is how that monopolistic or latent

monopolistic power would be exploited, and under the basing-point method it is exploited as fully as the industry can do it, it has found no more effective way.

Mr. Leisure: I move—

Trial Examiner Norwood: How does the basic-point system exploit it?

The Witness: By the practice of merely matching prices each mill is assured that whatever base price it fixes will remain without cut or reduction by any other mill. There may be active sales, more active sales actually made in its territory, more advertising, perhaps, or other things; but the price itself, the destination price, will remain untouched.

By Mr. Wooden:

Q. Are there any other ways than those that you have named in which you believe the basing-point system tends to promote monopoly?

A. Well, I think those are the essential things.

17755 Q. I just merely asked you whether there were any others.

In your opinion, Doctor, can the basing-point system of identical delivered prices exist or be maintained as the result of competitive forces operating independently of each other?

A. I think not.

Q. In your opinion, can the basing-point system of identical delivered prices exist or be maintained as an expression of the economic law of supply and demand?

A. I think not.

Q. In your opinion, can the basing-point system of identical delivered prices exist or be maintained without some form of cooperation among competitors?

Mr. Leisure: Just one moment.

I object to that. The Doctor has not been shown to have ever been in the manufacturing business, and until a proper basis is laid which would allow him to give a factual answer, I object to him giving any testimony on that subject.

Trial Examiner Norwood: I think the record has shown that. He has studied this system and these methods.

The objection is overruled.

Mr. Leisure: If Your Honor please, may I add to my objection?

17756 Trial Examiner Norwood: Certainly.

Mr. Leisure: It goes to the fact that the Doctor is here attempting to pass on whether or not there was collusion. Now that is going into the field that is to be decided by Your Honor and the Commission and the courts, and I do not feel that that is within the province of an expert witness, to decide the ultimate issues in this case.

He has not been shown to be an expert on collusion, and I submit that that question goes far beyond the ordinary question that should be put to an expert witness.

Mr. Zimmerman: Now, if the Examiner please, I object to the question first on the ground that it is not based upon the evidence, and, secondly, because it asks the

17757 witness to express his suspicion or his conclusion as to the essence of the complaint, made in the first part of the complaint herein.

The charge is that there is a conspiracy, combination, restraint of trade, without any assumption of fact, but in a question which sums up the entire issue which is aimed at in the first count of the complaint. The witness is now asked to express his suspicion, and that is not the proper office of such a question or of the testimony of this or any other witness.

Trial Examiner Norwood: I don't think it can be properly characterized as a suspicion.

Answer the question.

A. It is my conclusion as a student of basing-point practice of various industries that it is of the essence of the basing-point practice that there is cooperation and tantamount to an agreement.

It requires a mutuality of behavior on the part of those engaged in the system.

I have already indicated, in part, what it is that each one does or refrains from doing. The basing-point mill refrains from reducing its price to prevent raids into its territories; permits the outsider to match the governing price there, and, in turn, the other mill, when its territory is invaded, does not behave like a competitor but like a conspirator.

17758 Mr. Zimmerman: I move to strike out the answer if the Examiner please, on the basis of the objections made to this question that the witness has attempted here, now, to sum up by way of a conclusion the issue, which is attempted under the first count of the complaint herein, not based upon facts but based merely upon theory and his conclusion or suspicion.

Mr. Leisure: If Your Honor pleases, I would like to add to that motion, if I may, that the answer of the Doctor shows that the basis of his answer was that he concluded that certain people had come to agreement, and he hasn't been called here for that purpose, and he hasn't been qualified for that purpose.

Trial Examiner Norwood: He referred to uniformity of behavior and understandings. That is within the language of the charge.

Mr. Leisure: The exact language which he used is, "tantamount to agreement."

Trial Examiner Norwood: He explained; he qualified his language.

Mr. Leisure: And said "behaved like a conspirator." I submit he has not been qualified to give such legal conclusions and those should be and are within the province of the Commission and courts, not within the proper province of any testimony to be given by this witness.

17759 Mr. Wooden: The witness is an expert economist; has used economic language to give an economic interpretation of economic behavior.

Trial Examiner Norwood: Motion denied.

By Mr. Wooden:

Q. Dr. Fetter, what do you consider to be the main economic disadvantages of the basing-point practice viewed from the standpoint of the public interest?

Mr. Leisure: Just one moment. I object to that question on the ground, Your Honor, that it does not pertain to this case. Again, here, the Doctor has not been shown to be an expert on public interest and this is asking him to testify on a general system of marketing which may or may not be connected with this case.

17760 Trial Examiner Norwood: The objection is overruled.

A. I cannot pretend to answer with any technical meaning or the public interest in a legal sense. That would lead me into technicalities that I don't pretend to speak about, but as an economist I am convinced that the ultimate standard of judgment on economic questions is welfare and to take a rather concrete standard of welfare I should say there was cheapness of production, and you have heard a good deal of this, of late: Waste isn't good public policy. It is not good economic policy, and the basing-point sys-

tem is wasteful; primarily, because of the enormous amount of cross-shipments.

The abnormality of mills in supplying the demand in their own neighborhood when they are running under capacity and often far below capacity while shipping—

Trial Examiner Norwood: I think he is just
17761 illustrating the point there.

The Witness: I was not using any special technical sources of information, but published literature of the industry itself in this case.

If the industry is running a hundred percent then that is new information to me.

By Mr. Wooden:

Q. I think that one might almost take judicial notice of the state of demand and production in various industries during the last few years. I think it is a matter of quite common general knowledge that many industries, including cement, have been running far below capacity in their output.

Trial Examiner Norwood: Go ahead.

A. I certainly was not singling out cement peculiarly as being in that situation.

It is a situation certainly shared by many indus-
17762 tries.

Q. I would like to have you complete your answer.

A. The first thing I mentioned was the very evident gross waste of cross-shipments; the absorption of freight saves nothing to the buyer because he pays the same delivered price as if he bought from the nearby mill.

The enhanced base prices that prevail under the system represent a potential gain to the industry that is almost completely lost by waste of cross-shipment. It is the philosophy of waste, carrying bricks from one side of the street and then carrying them back again; it is the killing of liftle pigs and other policies of that sort that we, I suppose, all of us, deplore. The result of the practice is, further, a geographical dislocation. It is
17763 further—that is of the secondary industries, of those which used the material of the basing-point industries.

A further result, in all probability, is the temptation to excess capacity. The mills all have the feeling that the continent is their market, and they do not confine their estimates of possible demand to the territory surrounding the mill.

The fact that there is no permissible competition in price causes a sort of bootlegging competition in the form of high selling costs, greatly complained of in the basing-point industries, and this is purely salesmanship, and no substantial gain to the community.

A further loss, which is of a less material kind, is the fact that under the basing-point system sudden and unpredicted changes may take place in basing points, basing points may be put in where they were not before, or taken away. Thus the industrial fortunes of all those connected with the product who make use of the product, directly or indirectly, are put at stake at the hazard of some individual choice, rather than of impersonal economic forces.

17770 Q. I will ask you whether or not in your opinion the basing-point system of identical delivered prices has any effect or tends to have any effect upon the location of enterprises in an uneconomic locality?

A. I look upon that question as one with very large practical aspects. If the product sold by basing-point method is a basic material of a secondary industry; that is, of a fabricating industry; the basing-point practice as compared with a mill base or uniform one-price system unquestionably affects very greatly the

17771 advantages of location of secondary industries.

That, of course, was brought out more distinctly in the steel case. If the product is one that is used solely by final consumers, and there is no such product in the fuller sense, then, of course, the effect, geographical effect of the price system is felt directly by the ultimate consumers.

By Mr. Wooden:

Q. Is there any effect, in your opinion, as to the tending toward an uneconomic location of primary enterprises in an industry that uses the basing-point system?

Mr. Leisure: I make the same objection.

Trial Examiner Norwood: The objection is overruled.

A. I think that is one of the primary disadvantages as recognized by all students of the subject. I certainly feel it very strongly.

By Mr. Wooden:

Q. In your opinion as an economist, is there any relation between so-called price stabilization and unstabilized production?

A. Yes. That subject, of course, is discussed of late in connection with all sorts of industries, and I think there

is no dissent in the principle although there may be differences of degree in the opinion of economists all over the world to the extent that there is monopolistic price control and, therefore, stabilization, as the term is used, of
17772 prices in a period of business depression.

There is, to that extent, correspondingly an unstabilization of employment; that the two things are the counterparts of each other. That the industry which, in a period of business depression, succeeds in stabilizing its prices by whatever monopolistic power it possesses to a decidedly greater degree than the average industry is accentuating the difficulties to the other industries, throwing the burden of readjustment upon those industries in which competition is more intense.

Q. In your opinion as an economist, Dr. Fetter, is there any relationship between the basing-point system of identical delivered prices and an excess capacity to produce in an industry employing it?

Mr. Leisure: I object to the question as incompetent, irrelevant and immaterial.

Trial Examiner Norwood: Read that question.

(Question read.)

17773 Trial Examiner Norwood: Objection overruled.

A. I think there is; wherever price is artificially controlled and can be raised above the normal rate of profit; that higher profit tends to be a bid offer by excess capacity.

By Mr. Wooden:

Q. You say bid offer, b-i-d?

A. Yes, bid offer; that is to say, if the rate of profit in an industry is greater than the prevailing normal rate in other industries, industries are tempted into it in excess because the break-even point is very much higher if you have higher prices than if you have lower prices.

If the prices are on a lower competitive cost basis the break-even point is much nearer to full capacity; that is rather a complicated question of theory on which there might be differences of detail; but I think the general theory is well accepted.

Q. If it should appear that in the cement industry the break-even point is as low as 35 percent of the capacity, what would your reaction to that, as an economist be?

17775 A. That the term "capacity," like all these other is often a very vague one.

I also, I think, would recognize that the very low capacity of industries at a time of deep depression, that is the depth of the business cycle, cannot be taken as a fair criterion. There is a time when almost all capacity of every industry is lower, and I think that would not be a fair measurement.

However, if the range is so wide as from 35 percent to a vague 100 percent, that would seem to be a tremendous surplusage; would allow, I mean, for a great deal of confusion and inaccuracy.

Of course no industry wants to have this excess capacity. The ideal is to run to capacity. And they all knew that if they would run to capacity at very much lowered prices, that they would come out better in the long run, but just where, that is a technical matter, and I admit I have not had experience in that, and I would not wish to tell the industry how to run its own business on that point.

By Mr. Wooden:

Q. Dr. Fetter, if the statement were made to you that the public interest is best protected by the long-
17776 established practice of meeting competition in the sale of cement, what would be your reaction as an economist to such a proposition?

A. If the long-established method means the basing-point method, I would disagree quite fully. I believe that it is not a method in accord with the public interest, nor, in the long run, in the interest of industry.

By Mr. Wooden:

Q. What about the long-established practice of meeting competition?

A. Well, of course, that involves that phrase of "meeting competition" which we discussed in another connection. I think that that is a play on words.

*Cross-Examination.*

17777 By Mr. Leisure:

17780 Q. Have you ever been employed by the Federal Trade Commission?

A. I have.

Q. When were you first so employed?

A. The spring of 1934 for the special work of collaborat-

ing on the report on the steel industry under the code as called for by the so-called Borah Resolution.

Q. How long did that employment continue?

A. Three months.

Q. When were you next employed by the Federal Trade Commission, if at all?

A. Last summer.

Q. What was your scope? What was the scope of your work during that second period?

A. I was engaged to—as special advisor to the Chief Counsel.

Q. How long did this employment continue?

A. That is since last June.

Q. Does that employment continue up to the present time, or have you been employed on any subsequent occasions by the Federal Trade Commission?

A. No, not been employed on any subsequent occasions.

Q. Does that—

A. Continued until the present time.

17781 Is that continued up until the present time?

A. Yes, that continued up to the present time.

Q. And you have been here in the courtroom during part of this hearing, at least when the economic witnesses were testifying on behalf of the Commission?

A. Yes, I was.

Q. And you are at the present time employed by the Commission, are you not?

A. I am.

Q. Between the first time that you have told us about when you were employed by the Commission, and this second employment which you have also described, have you consulted with members, or representatives of the Federal Trade Commission's staff, upon any questions, on basing-point or marketing policies?

A. There has been no time since 1924 when I have not seen some members of the staff of the Federal Trade Commission some time in the course of a year.

17785 Q. Now, did you testify in 1936 before the Senate Interstate Commerce Committee in favor of the so-called anti-basing-point bill?

A. Yes, I did.

Q. What was that proceeding?

A. It was on a bill that was introduced by Senator

Wheeler for the abolition of the basing-point practice.

17789 Q. Now, did you also testify at the hearing at what is commonly known as the Monopoly Committee, here in Washington?

A. I did, recently.

Q. I am now, of course, referring to the Temporary National Economic Committee.

A. Yes.

Q. And when did you testify there?

A. I appeared on two occasions. One, I believe, was the 28th of February, and the other a week later,

17790 the 7th and 8th of March.

Q. Does the Federal Trade Commission, or has the Federal Trade Commission, since you have been connected with it, had a so-called basing-point committee?

17791 A. I am not at all sure whether officially I am. I have talked with some of the members of the committee. My engagement with the Federal Trade Commission was essentially in connection with this complaint, and anything else that I have done has been simply because I happened to be here and was asked my opinion on various things, to assist them when I could.

17803 Q. For instance, you testified, did you not, in the Senate hearings on the proposed anti-basing-point bill, as follows:

"I cannot pose as a factual witness"?

A. Yes, I think I must have said that. I said the same thing here.

Q. Your training has been as an economist, has it not?

A. Yes, primarily, although I took a Masters Degree in philosophy, and I gave as much attention to history and philosophy as—did I say a Masters Degree in

17804 philosophy? I mean a Masters Degree in Politics, Political Science, and I gave as much attention to history and philosophy as I did to economics.

Q. But do you or do you not consider that economics is your special field?

A. Oh, yes, certainly, that has been my main work for over 40 years.

17806 Q. I think the first question that I put to you, without confining it to economics, covered your objection, the one you are now raising to this question. The first question I asked you was whether or not a man

who had made a specialty of a particular subject would be better qualified to express an opinion on that subject than one who had not.

You objected to that question and when I specified for you you objected because I specified.

Will you do your best to answer the question?

A. A man who has studied a subject, other things being equal, is far better qualified than one who had not studied it.

Q. Have you ever graduated from any law school?

A. No.

Q. Have you ever been admitted to the bar of any of the courts of this country?

A. I have not.

Q. You have testified as an expert witness in
17807 other cases prior to this one, though, haven't you?

A. Yes.

Q. And in all those cases when the occasion arose have you always taken the position of a protagonist against basing-point methods of selling?

A. No, all my testimony has not been on basing point.

Q. I said when the occasion arose.

A. Yes, I have in the one other occasion—well, the one case and the Wheeler Bill; in both cases. I didn't consider it was necessary to shift from one side to another on a matter which I had studied for a number of years.

Q. And you also testified as an expert witness in the Monopoly hearings, did you not?

A. Yes.

Q. And you testified as an expert witness in the so-called Wheeler hearings?

A. I mentioned that a moment ago.

Q. Now, would you say that where this question has arisen you have always been more or less unreasonable in your criticism of the views of others, whenever or wherever they differed with your views, on this particular subject?

A. Not at all. I certainly will not confess that.

Q. Did you publish a book called "The Masquerade of Monopoly" in 1931?

A. I did.

17810 Q. Did you, on page 33 of this book, charge the Supreme Court of the United States with having

failed to render a clear, legal judgment on the case before them, namely, the Steel case?

A. I think I better see the text. I do not know
17811 how much of that is your wording and how much is mine.

Q. Let me read you the first paragraph so that we will all know how much is mine and how much is yours.

"The Supreme Court failed to pass either a scientific or a clear, legal judgment upon perhaps the most," and so forth.

Mr. Wooden: Read the "and so forth."

A. Yes, my reference to this was solely because the Supreme Court—

By Mr. Leisure:

Q. I did not ask you what your reference was to. I asked you whether or not you made that statement.

A. I made that statement, which means that the Supreme Court—

Q. I did not ask you that.

A. —denied the basing-point—

Q. I did not ask you that, and I ask to have that answer stricken out.

Mr. Wooden: Let us have the whole statement.

Trial Examiner Norwood: No.

Mr. Leisure: This is cross-examination.

A. Of course I made the statement; it is in the book.

17812 Q. And because the Supreme Court in that case did not render what you thought was a clear legal judgment, did you charge them with shirking their job and with side-stepping their responsibilities?

A. No, I think that is your own wording of it.

Q. All right, let us see if it is.

(Referring to book): Page 33, caption in the middle of the page, under which this discussion takes place: "Shirking its job." The first sentence under the heading "Shirking its job," is "The Supreme Court failed," and so forth, and then further on you say:

"The Court lacking * * * side-stepped its responsibility."

What Court are you referring to there?

17813 Q. Did I read correctly, Dr. Fetter?

Mr. MacIntyre: That is proper.

Q. Did I read correctly from your book just now (handing book to witness)?

A. (Witness examines book.)

Q. And if I did, will you please give us an answer to your question? My question was what Court were you talking about under that heading?

A. I was talking of the Supreme Court.

Q. Very good.

And did I correctly read the quotations on the page (referring to book)?

A. Yes, just the—

Q. "Shirking its job?"

A. "Shirking its job."

17814 Q. (Again referring to book) "And side-stepping its responsibility" is correctly quoted by me, is it not?

A. Yes.

17815 Q. Now, as to whether or not your criticisms have been reasonable, which you say they have been, Doctor,—did you, on page 94 of your book, use the term: "Judicial somersaults" with reference to the Supreme Court in the Steel case,—251 U. S. 442?

A. I think that is the phrase I used with reference to Justice McKenna's decision.

Q. Yes.

Was that intended to be an intriguing title to the discussion, such as "Masquerade of Monopoly"?

A. It seems to have been.

Q. On page 227 of your book you have a heading as follows: "A bewildered judge." In using that heading, did you have reference to what you considered to be the mental attitude of the Supreme Court?

A. Well, it is in the singular, is it not?

Q. Yes.

A. It meant the judge.

Q. But the Court happened to be rendering the decision of the court in that case, which is the Lindsay Oil case, 262 U. S. 271.

17816 A. Yes, the Supreme Court has jurisdiction over the lawyers but not over the economists.

Q. I am merely asking you at the moment whether or not, in order that we may have some understanding of your mind on these subjects—

Trial Examiner Norwood: Answer his question directly.

By Mr. Leisure:

Q. I am asking you whether or not you made that statement on page 227 of your book.

A. I suppose so.

17823 Washington, D. C.,
March 22, 1939.

17825 DR. FRANK A. FETTER thereupon resumed the stand and testified further as follows:

Mr. Wooden: Your Honor, I wish to make a motion at this time to strike from the record the questions and answers directed to this witness relating to extracts from his book, "The Masquerade of Monopoly," relating to the matter of differences of opinion which he expressed with the opinion of the Courts on certain cases, on the ground that such writings of his in no way tend to show prejudice or bias on his part with regard to the subject matter of his direct testimony, or with regard to the basing-point system about which he testified, and about which he wrote in the book in question.

17826 It is obviously nothing but an attempt to prejudice the courts who may review this record, against the witness, because he expressed disagreement with some of the things which the courts did and said.

Mr. Leisure: If Your Honor pleases, I do not concede any of the state of facts which Counsel has just made.

We are now dealing with an expert, and the expert's testimony yesterday did not confine itself to basing points. Neither did the direct testimony confine itself to this case.

The witness was allowed to run the entire gamut of economics and give his opinion about industries at will, without being confined to this case. His opinion on basing points in general, his opinion on monopoly in general, of which he gave us a definition, his opinion on competition in general, his opinion on delivered prices in general, was not confined to this case. He also discussed prices at length, the nature of price. He discussed mergers and the effect of mergers.

Now, clearly, when a witness—if I were confined, as

Counsel suggests, it would be confining me more closely on cross-examination than Counsel for the Commission was confined on direct examination.

Clearly, Your Honor, where a situation such as I have outlined, and I think I have stated the record cor-
17827 rectly,—if I haven't I am sure Counsel for the Commission will correct me; where that situation obtains I should have the right to test this witness as to how he makes up his conclusions; as to how his conclusions were arrived at in other cases where he discussed similar problems, and if I cannot cross-examine an expert witness on his own book written on the subject he has discussed on his direct examination, what can I cross-examine him on?

Trial Examiner Norwood: Is Counsel making those questions the basis for further cross-examination?

Mr. Leisure: The whole cross-examination is based on these questions because these questions show how he approaches these problems, and they are the preliminary questions, the basic questions for this witness. They are the setting, if you will, for his whole cross-examination.

Mr. Wooden: I wish to take issue with the statement that the witness was allowed to run the whole gamut of economics on the whole question of combinations in restraint of trade. I am quite sure that I confined my questions to the basing-point system of identical delivered prices and anything else that came into that was merely incidental and I do not believe even anything else came into it that was not tied down to the proposition of
17828 the economic status of economic system of delivered prices. Any references to that system in other industries was perfectly proper as a part of the background of the witness in reaching his conclusions. It is one of the things which Mr. Leisure says he is entitled to go into. I don't question he is entitled to go into any background that effects the basing-point system, but he has gone into cases that don't involve the basing-point system.

Mr. Leisure: If Your Honor pleases, I am just as certain as Counsel for the Commission that his questions did go further than he has suggested. He may have intended to confine them but the record will speak for itself, and I am also sure that however Counsel may have intended his questions or however he may have phrased his questions, the voluntary character of the answers, the unresponsive

character of the answers, to which I objected repeatedly, went far beyond basing-point system.

I recall distinctly his description of merger and the effects of merger.

Mr. Wooden: Upon the basing-point system.

Mr. Leisure: I recall distinctly his discussion of prices and competition and monopoly, and if it is to be confined, as Counsel suggests—I don't want to take more
17829 time than Your Honor feels I should—if it is to be confined, as Counsel suggests, the witness has said that the subject of his book "Masquerade of Monopoly" refers to basing point, and that is what it means.

My associate, Mr. Bond, just shows me, at page 17636 of the record, where the answer by the witness is: "In 1931 I published the 'Masquerade of Monopoly', dealing largely with the basing-point problems."

The very title of the book itself, as the witness has testified, I believe, has reference to basing-point system.

Therefore, it seems to me that Counsel cannot raise the point now that when I ask him questions about the book which the book itself says it is about the basing-point system, that I am going beyond the proper realm of cross-examination.

Trial Examiner Norwood: We need not bring in all these other matters because we are going to decide this particular question on its own merits, and I cannot see, as I stated, where your bringing out, where this witness disagrees with the Supreme Court, in any way indicates bias.

I am satisfied we can find Supreme Court decisions that the learned counsel does not agree with, and I don't think that would show any bias, and I shall have to
17830 study this record.

I intended to do it this morning but I didn't have time, and I shall take that motion under advisement.

Mr. MacIntyre: If Your Honor please, I think the question that you propounded to Mr. Leisure when he first started his speech-making this morning is very apt. You asked him the purpose of that nature of cross-examination.

I think that Mr. Leisure's reply made it more clear than even the testimony of yesterday, and it can be summed up in this one short statement: That a man, and even the millions of people in this country, could and should

be condemned for criticizing the Supreme Court's decision in the Dredd Scott case, or any others.

Mr. Leisure: If Your Honor pleases, I think Counsel's statement indicates the misapprehension and the improper conclusions he has drawn as to the purpose of this testimony. Whether or not this witness disagrees with the Supreme Court is not important at all in this case, but what is important is how this witness arrives at his conclusion.

I have attempted to ask him these questions in connection with monopoly and competition as bearing upon the decisions of the Supreme Court as to how he arrived at his conclusions.

17831 Trial Examiner Norwood: Well, you have not gone over that.

Mr. Leisure: If I cannot ask the witness that, I do not know what I can ask an expert on cross-examination.

Trial Examiner Norwood: You have simply gone into what some of those conclusions are.

Mr. Leisure: Yes.

Trial Examiner Norwood: You have not gone into how he arrives at them.

Mr. Leisure: No, so far I have not been allowed to ask him that.

Trial Examiner Norwood: Well, go ahead.

I will take the motion under advisement, and I want to read the record and see just what was testified to.

Mr. Wooden: I can only say, Your Honor, that if that line of questioning, and answer, remains in the record it will require us to go into other portions of the book.

Trial Examiner Norwood: Yes.

Mr. Wooden: Which will put a somewhat different face upon the situation.

17833 *Cross-Examination (Continued) by Mr. Leisure.*

Q. Dr. Fetter, yesterday, when the hearings adjourned we were discussing a book published by you, I think you said "The Masquerade of Monopoly."

Did you mean that was published by you in 1931?

A. It was.

Q. Yes. And I notice in the contents of that book, Dr. Fetter, the prologue, "The Masquerader," page 3,—"The Masquerader."

Would you explain, for the record, and for the Examiner, what that means, "The Masquerader"?

A. That principally refers to the basing-point practice.

Q. Yes.

A. Yes.

Q. Now, I also observe that in discussing this basing-point practice, and as well as discussing monopoly and competition, on page 350 of your book, you referred to the courts and particularly to the Supreme Court, as having been adrift on this subject.

Would you explain to the Examiner how you arrived at that conclusion, please?

17834 A. By long and careful study of the Supreme Court records in those cases.

Q. I mean, I have correctly quoted you—you were referring to the Supreme Court of the United States, were you not?

A. In the passage you quoted?—

Q. Yes.

A. —Particularly yesterday.

Q. Yes, the one about the courts adrift.

A. When you called my attention to that, of course I did not know the context.

Q. Yes.

A. And I thought that referred to the Steel Dissolution suit. It was a wrong inference. I did not see the book at the time. It seems—I have refreshed my memory on that—and it seems that that referred to the Rule of Reason decision in 1911.

Q. Quite right.

A. In reference to the oil decision.

Q. Quite right, yes.

A. And the opinion there of disappointment—the expression of disappointment—was one that I am sure was very general both in the legal and in the economic fraternities.

Q. Yes, and to answer my question, Doctor, you were referring to the Supreme Court of the United States?

A. I was, yes.

17835 Q. And when you used that language, "adrift," you, of course, did not mean physically, you meant mentally adrift, did you not?

A. As regards the issues?

Q. Yes.
A. In the Monopoly case?
Q. Certainly.
A. Yes.

17840 Q. Dr. Fetter, after quoting on page 378 the following language: "The prospect of a merger added an element of mystery to a stock's value"—do you see it—and then you have asterisks, stars; you start the next paragraph of your own writing with the phrase: "As credulous as the Supreme Court regarding the statements of promoters."

Will you explain how you arrived at that conclusion, please?

17841 A. This statement is primarily in reference to the credulity of the public. The public seems to have been as credulous as the Supreme Court regarding the statement of promoters, and the statement preceding that is a quotation from the financial columns of one of the great dailies, and as far as any references to credulity of the Supreme Court, I can only ask that you take the whole book as the context of that statement. The outstanding case which is discussed at some length was the argument of the Supreme Court with reference to the motive for the formation of the United States Steel Corporation. That is dealt with at very considerable length.

By Mr. Leisure:

Q. I will not promise to take the whole book, but I do promise to take some of the principal parts of it if you will just allow me to get along with it, if we can.

A. Yes.

Q. But regardless of your statement just now as to the public, Dr. Fetter, I have correctly quoted you in your book, have I not, when I say that you have used the phrase "as credulous as the Supreme Court"?

A. It is there.

Q. Thank you.

On writing on the same subjects which you testified to on your direct examination, namely, monopoly, basing point, competition, I notice that on page 218 of your book, "The Masquerade of Monopoly"—you have it there

17842 —when Mr. Justice Stone of the Supreme Court passed on those very issues, you have quoted and placed in quotation marks the word "Justice Stone's 'Rea-

sons,'" and you have placed in quotation marks "Reasons."

First, tell us whether or not you have done that? The second paragraph, Dr. Fetter, the first line, on page 218.

A. Yes, that word is enclosed in quotation marks.

Q. Will you explain to the Examiner, please, how you arrived at your conclusion that Justice Stone's reasons, in discussing competition, monopoly, and basing point, should be placed in quotation marks in your book?

A. Because they did not appear to be sound reasons, to me.

Q. Thank you.

I also observe that in your book at page 237 in discussing these self-same facts which we have already repeated several times, you refer to the "Judicial blindness of the Supreme Court."

First, will you tell me whether I have correctly quoted you,—page 237, in the third paragraph, the last line?

A. Yes, those words occur.

Q. Now, will you explain to the Examiner how you arrived at that conclusion as to the Court's decision discussing these self-same problems which you dis-
17843 cussed on your direct examination?

A. The chapter as a whole points out that the evidence and the Counsel's argument for the Government—

Q. Never mind the counsel; it is the Court's decision I am asking about.

A. You asked me how I arrived at that understanding.

Q. Yes.

A. I am telling you.

Trial Examiner Norwood: Complete your answer.

A. I set forth, there, the fact that the Court did not have a correct statement put before it in the Counsel's argument or in the evidence submitted in the case.

By Mr. Leisure:

Q. I see.

A. The Court, therefore, was misled. The term "blindness," there, is equivalent to "did not see."

Q. Now, will you take your time, Doctor, and explain to us and to the Examiner fully for the record how the Court was misled there when you used that term "judicial blindness"?

A. I don't think that I could undertake now to restate all of the steps by which I reached this view by very careful and prolonged study 10 years ago, or very nearly 10 years ago.

Q. I will accept that as an answer.

A. Yes.

Q. Now, I observe further in your book at page
17844 111, you suggest that the "litigants roared with laughter at the naive economic views of the Supreme Court." In fact, you say—to state it exactly—

"How the successful litigants must have roared with laughter over these naive economic views."

When you wrote that statement, did you mean that the Supreme Court of the United States was naive when comparing its economic views with your economic views?

A. It didn't compare its economic views with mine.

Q. I am merely asking you whether that is what you meant.

A. I couldn't have meant it.

Q. Sir?

A. When they didn't compare them with mine.

Q. Did you compare them, to arrive at that conclusion?

A. You will observe that I didn't say that the successful litigants roared with laughter, as you first stated it.

Q. Oh.

A. I said, "How the successful litigants—."

Q. Now, let us just—

A. "—must have roared—"

Q. Let us see now whether I quoted you correctly. I said, "How the successful litigants must have roared with laughter."

A. No, before that, before that.

Mr. Wooden: I noticed that at the time.

17845 By Mr. Leisure:

Q. "The litigants roared with laughter."

A. You say that I asserted that as a fact. I did not.

Q. Oh, you are objecting to the phrase "must have"?

Mr. Wooden: Yes.

A. Yes, it puts quite a different light upon it.

Q. But I did quote you correctly, did I not, Doctor, when I read the quotation?

A. I don't recall.

Q. Well, I will read it again: "How the successful

litigants must have roared with laughter over these naive economic views."

A. Yes, that is a correct statement.

Q. That is correct?

A. Yes.

Q. What I am trying to get at is how you arrived at the conclusion, Doctor, that the economic views of the Supreme Court in that case—which, by the way, is the Steel case, 251 U. S.—how their economic views were naive?

A. That is set forth in very considerable detail in the book, and the—

Q. But that was your opinion when you wrote the book?

A. Yes, it coincided with a very decided minority opinion of the court.

Q. And that coincided—

17846 A. Three-sevenths of the Judges who passed on the cases.

Q. And that coincides with your opinion, today, as to the statement that you made at that time,—I mean you have not changed your view any?

A. Not essentially, no, on that point.

Q. When you say that that coincided with the views of the three dissenting Judges, do you mean that the three dissenting Judges wrote decisions showing that they considered the economic views of the majority of the Court as naive?

A. I do not mean that they used that expression, but they very strongly dissented and disapproved of the views set forth by the majority.

That opinion, as, of course, you know, was written by Justice Day, and agreed with by Justices Pitney and Clark.

Q. But, Doctor, did they dissent on economic or legal grounds?

A. On the issues of the case.

Q. Now, going on further in your book, in discussing these same problems that we have outlined before,—at page 448 you say:

"The good Judge was all at sea, land nowhere in sight, without sextant or compass to fix his latitude or longitude."

Now, that was, of course, intended to describe, and to

be a description, and indicate the condition of the
17847 Judge's mind prior to the time that you wrote your book, was it not, Doctor Fetter?

A. What was the page?

Q. Page 448.

A. (Witness consults book.) That, if I read it rightly, refers to the decision of Judge Carpenter in the District Court.

Q. That is right.

Q. Yes, and that comment was with reference to him.

Q. You were discussing there, were you not, the problems that we have been talking about, basing point. For instance, you say in the third line from the bottom—you have used the words "basing point." You also discussed on your direct examination "discrimination."

You will observe there the words "discrimination in prices." That is on page 447.

A. (Witness consults book.) Yes.

Q. You were discussing there those very subjects that you discussed yesterday on your direct examination, were you not?

A. Yes, and I was deploring the fact that the Judges utterly failed to understand the issues. The explanation given by the industry always served to mislead the Judges.

Q. What industry were you referring to there?

A. Let us see, this was (referring to book)—I think this was the Linseed Oil case.

17848 Q. Yes, it was the Linseed Oil case, which you discussed in more detail at page 224,—is that not correct?

A. Yes.

Q. Now, I notice further in your book—rather, not further—going back to page 81, Dr. Fetter—that you defined a decision rendered by one of the Justices of the Supreme Court,—the Judges here rendering the decision of the Court,—"A loose proposition from which is drawn a lame conclusion."

A. Yes (referring to book).

Q. Were you there discussing the problems which you discussed yesterday on your direct examination?

A. (Witness consulting book.) No. I think that that was a discussion of the power of monopoly resulting from size—

Q. Now, you discussed monopoly—

A. —in the case of the Steel Corporation.

Q. You discussed monopoly, yesterday, did you not, Dr. Fetter? You discussed monopoly, yesterday?

A. Sure, and basing point itself is monopoly.

Q. And you discussed influence of prices, did you not?

A. Basing-point prices, of course, yes.

17849 Q. And that appears here in your discussion of this matter on that same page?

A. No, that is not primarily the matter at all, there, on that page, as you will see; it is a question of the size of the United States Steel Corporation.

Q. Yes:

And in discussing that, and in arriving at this conclusion which you arrived at, you were discussing, as appears in the first line on the page, effect upon prices of such a vast merger, and as appears in the second line of the second paragraph, "The influence of prices and restraint on trade."

You were considering those subjects at that time, were you not?

A. I cannot see that I was discussing there at all primarily or directly the basing-point practice.

Q. Well, now—

A. I was discussing that part of the decision that dealt with the power conferred upon the courts by great financial merger.

Q. And the power of monopoly; is that correct?

A. Yes.

Q. Yes:

And you discussed both those things in your direct examination, Dr. Fetter, did you not?

17850 A. No, not—

Q. Did you not discuss merger?

A. Not primarily or directly, at all.

Q. I did not ask you about primarily. Did you not discuss both those things in your direct examination?

Mr. McFadden: May I suggest that just before the noon recess yesterday Mr. Wooden asked you:

"If a large part of the cement industry is concentrated in the hands of a few large companies controlling a third of the mills and producing 40 percent of the product, does this have an effect on maintaining the basing-point system?"

By Mr. Leisure:

Q. So, Dr. Fetter, you recall testifying on that subject, do you not?

A. Yes, I do.

Q. Yes. So it is with reference to that same subject that this quotation is made, is it not?

A. No. I have repeatedly said that—

Q. Have you not just said so?

A. —it is not. It is with reference—

Q. All right. Suppose we start—

A. —to that aspect —

Q. Suppose we start all over again:

Will you tell us what this quotation does have
17851 reference to.

A. It refers to the question of monopoly power conferred upon a combination by reason of its financial size.

Mr. McFadden: That is just what I was saying.

Mr. Leisure: I think that the record is clear on that.

By Mr. Leisure:

Q. Do you recall having made this answer on your direct examination, Dr. Fetter,—page 17746:

"It seems to me evident that such a concentration of financial control would greatly facilitate the maintenance of any system of pricing that was adopted by an industry."

A. I—

Q. Do you recall that?

A. I say I recall it, yes.

Q. Yes.

Again, dealing with these identical subjects, namely, basing point, and monopoly, and competition, and price,—I note on page 150 of this book of yours, entitled "The Masquerade of Monopoly," you have referred to the "dim sight and dull ears of the courts."

Will you tell the Examiner what the heading is under which you have used that—if I may so describe it—rather intemperate language? Page 150.

17852 A. 150.

Q. The subhead in the middle of the page.

A. "A non-producing basing point."

Q. Yes.

Now, that condition of the courts which you have described was again prior to the advent of your book, was it not, Dr. Fetter?

A. Let me see what you are talking about there (referring to book).

Q. Well, I am merely talking about the date of the publication of your book at the moment.

A. (Witness studies book.)

Q. Do you see the language to which I have just referred, Dr. Fetter, starting with the first paragraph under that heading, "A non-producing basing point"?

A. Yes.

Q. On page 150?

A. Yes, I see that sentence.

Q. Yes.

Now, Doctor, in discussing these identical questions that you discussed on your direct examination, without repeating them, have you previously, and, to be exact, on page 72 of your book entitled "The Masquerade of Monopoly," —have you gone so far as to accuse the Supreme Court of improvising for a special occasion?

17853 A. Improving what?

Q. Let me read you the quotation. You correct me if I do not read it correctly.

Page 72: "It is clear that the Court has improvised for the occasion a new statute of limitations to nullify the operation of the anti-trust act."

Do you find that there?

17855 A. Yes. That statement is there.

By Mr. Leisure:

Q. I would like to have you explain to the Examiner how you reached that conclusion, Doctor?

A. That is explained in some detail in the context in that chapter showing that the Court, if I recall rightly, that the Court itself declared that at the time being that was a violation of the law, but that so many years had gone by that the Court would forget it.

Of course, I am just paraphrasing.

Q. You were, of course, Doctor, as appears further back in your volume under that heading, you were discussing restraint of trade and monopoly and these other subjects which I have already referred to? Do you see them there?

A. Yes. Of course, primarily, the central subject was the formation of the giant corporation in steel.

Q. And the economic problems involved, you were addressing your attention to?

A. Yes, and throughout clear on to the steel dissolution opinion I am pointing out that the basing point practice never appeared or was presented at all clearly to the Court.

17856 Q. And that was why you discussed it here. You were registering your complaints to that in this way.

A. That came in as a part of the treatment, yes.

Q. Now in discussing the problems which you discussed on your direct examination which I have repeated several times, and without going into them in detail, in those discussions with reference to the Supreme Court and in arriving at your conclusions, have you always been particularly dignified in your criticism of the Supreme Court?

For instance, I want to call your attention to page 95 of your book where you say:

"The plurality of the Supreme Court, however, in this instance, referred to loop-the-loop with Judge Buffington."

Do you find that there?

A. Yes, that statement is there.

Q. Now on that page, page 95, "Supreme Court" referred to the Supreme Court of the United States, did it not, Dr. Fetter?

A. Yes; it refers to the plurality of the Supreme Court.

Q. Yes.

17857 A. Yes.

Q. Again you were discussing, there, as indicated on the preceding page, 93, resulting economic advantages and the subject of integration within a single plant, and other subjects which you have covered on your direct examination yesterday, were you not, Dr. Fetter?

A. Yes, I think those are some of the things that are involved—I used the words "technological advantage" I believe, "of a large production."

Q. Yes.

How did you reach that conclusion? Will you explain that to the Examiner, please?

A. Which conclusion?

Q. The one that you have expressed there at page 95 which we have already read into the record.

A. That is all explained at length in the context.

Q. Can't you tell us what you meant by that phraseology, at least?

A. The expression "loop-the-loop"?

Q. Yes.

A. That, of course, is a very popular expression of thought; namely, that the Court held opposite views within a very few moments of each other in the decision; expressed opposite views.

Q. And "loop-the-loop" implies going around in 17858 circles, does it not?

A. Yes.

Q. Now I observe in your book where you discussed these problems which you testified to yesterday; namely, monopoly and competition and the others we have named on page 348 and 349 with particular reference to the Continental Tobacco Company, that you say that "observe that this is not now said to be the 'popular sense of the word' "—the "popular sense of the word" being quoted, "but is the sense or nonsense of three Circuit Judges. In such elementary errors as these (this) germinated the rule of reason."

Would you explain to the Examiner now, in discussing this question of monopoly and competition, how you arrived at that conclusion?

17861 A. The text reads: "Sense or nonsense of three circuit judges," and—

Q. Did they render the decision of the court in that instance?

A. That was the lower court.

Q. Yes.

A. Not the higher.

Q. Yes. Did they render the decision of the court?

A. Yes, and that went up to the Supreme Court (referring to book). "In such elementary errors as their germinated rule of reason."

There was an inaccuracy in the quotation.

Mr. Leisure: Mr. Reporter, have you got "these" or "this"?

The Reporter: I have "these," Mr. Leisure.

The Witness: "Germinated," yes.

The Reporter: Yes.

The Witness: Well, that is just a mere point.

By Mr. Leisure:

Q. Now, would you explain to the Examiner how you reached that conclusion?

A. The particular question there was the definition—was the distinction between competition and monopoly,

and the statement made, as I say, is incredible, as coming from three circuit judges that it identifies competi-
17862 tion and monopoly after sale and after transportation of an article, which is the subject of interstate commerce, is a successful attempt to monopolize that part of this commerce which concerns that sale or transaction.

And, consequently, every competitive sale is a monopolistic sale, and every competitive market is a fully monopolistic market.

I think that would shock anyone with a minimum of economic training.

Q. And it was that explanation which you have just given us that you had reference to when you used the phraseology which I have quoted?

A. Yes.

Q. Now, as to these other quotations which I have read to you from time to time, before we go any further is there any further explanation that you would like to make at this time as to any of them, Dr. Fetter?

A. Yes, I would be very glad to make the general explanation that would apply to all of them.

Q. Yes. Give us any explanation that you would like to make.

A. That is, the criticism or implied criticism in all of these questions refers to the rhetoric and not to the reasoning. Moreover—

Q. Refers to what?

17863 A. To the rhetoric, or choice of words. The conclusions in these matters were, of course—my conclusions in these matters—were, of course, arrived at a good while before the particular phrasing of the book, and the book was not written as a brief to submit to the Supreme Court. It was written as a statement to be read by the public of a matter that seemed to me, after years of study in the philosopher's closet, to be of very great public importance, and I chose the phraseology with a view to getting the public to read it.

In that I was fairly successful, and I might be criticized for my judgment as to that practical aspect of it, but I would again emphasize that the phrasing in all these cases was a popular phrasing which does not at all reflect the state of mind in which I arrived at the conclusions after long and careful and unbiased study.

Q. Have you any further explanation, Dr. Fetter, that you would like to make?

A. That is all, I think.

Q. Now, as to the very first quotation which I read to you, in which you charged the Supreme Court of the United States with having failed to render a clear legal judgment, do you feel that that has reference—that is on page 17810 of the record—

A. 17810?

Q. —do you feel that that has reference to rhetoric only?

It appears on page 33 of your book, Dr. Fetter.

17864 A. (Witness consults book): I think the phrase to which you refer, "shirking its job"—

Q. No, I am not asking about that. I am talking—

A. That is what you asked me about yesterday.

Q. No, I am asking you—

A. Yes.

Q. I am asking you a question just now about page 33.

A. Yes.

A. I think that every passage to which you have referred to you have emphasized the phraseology as indicating an intemperate state of mind.

By Mr. Leisure:

Q. Well, without taking the other up just yet, would you mind addressing your attention to this one, Doctor. My question is concerning this one.

Mr. MacIntyre: Let him answer.

A. No, I would call attention to the fact that you are asking a different question regarding this passage from the one you asked me about yesterday.

Q. Yes, I am.

A. Yes.

Q. And I am asking you that question because you

17865 have stated to the Examiner that all of your criticisms were merely matters of rhetoric.

A. Oh, no, no.

Q. And I am now asking you—

A. Oh, no, no. I say that you were calling attention in all of your criticisms to matters of rhetoric.

Q. All right. Then let us put it that way.

Am I calling attention to a mere matter of rhetoric when I quote, on page 33 of your book, Doctor, the following language:

"The Supreme Court failed to pass either a scientific or a clear legal judgment"?

A. I think that is a very plain simple statement.

17866 Trial Examiner Norwood: Read the last question, please.

The Witness: That is if that is not a satisfactory answer.

(Last question re-read by Reporter.)

A. No, that is not a mere matter of rhetoric. As I say, it is a plain statement.

By Mr. Leisure:

Q. Now, Doctor, will you turn to page 347 of your book, and I would like to ask you to explain to the Examiner how you arrived at your conclusions with respect to this quotation which has to do with competition and monopoly and these other points that you discussed on direct examination yesterday.

The quotation is as follows:

"Whenever a word has come to have various shades of meaning, in the law, it is certain that some judge will some time go to the limit of verbalistic folly and propound a definition that is mere sound, without sense. Circuit Judge H. E. Jackson made a bid for the prize."

Do you find that statement there, Doctor?

A. Yes, at the bottom of the page.

Q. And do you find that it is under the heading "Competition and Monopoly"?

A. And "Nonsense."

17867 Q. Yes.

A. Yes.

Q. Will you explain how you arrived at that conclusion, please?

A. That, I think, is completely explained in the context.

Q. And without referring to the context, can you tell us, briefly, now, how you arrived at it?

A. It is that same identifying of competition and monopoly which makes them one and the same thing that we discussed a few minutes ago, so that we have already disposed of that.

Q. Now, Judge Jackson, whom you have referred to there as "having bid for the prize," was commissioned a Justice of the Supreme Court on February 18, 1893, and served until his death, until August, 1895, and you took the trouble to set that fact out in your book in conjunction with this above statement, did you not, Dr. Fetter?

A. Yes, I did.

Q. Now, I would like to ask you further how you arrived at the following conclusion, where you were also discussing monopoly and price competition and markets, all being matters which you testified to yesterday on direct, when you, on page 418 of your book, used the following language:

"Many have remarked upon the Janus-faced attitude of the Court in this respect."

You are there discussing the Supreme Court of
17868 the United States, are you not, Doctor?

A. Yes.

Q. Will you explain, Doctor, how you arrived at that conclusion?

A. By a study of the cases and confirmed by views expressed at that time—that had been expressed before that time by various students of the subject. It was the same matter which came up for discussion at an early meeting of the Monopoly investigation on Capitol Hill, and I think it was on the second day there was a little controversy—

Q. Doctor, you didn't arrive at your conclusion, did you, by something that happened the other day?

A. No. I am citing the fact—

Q. Would you mind answering my question?

17869 Trial Examiner Norwood: Let him make his explanation.

A. I was calling attention to the fact that already students of the subject had called attention to that, and the course of events since then, which is, say, from 1931 to the present year, eight years, has but confirmed the truth of that conclusion that the Court has taken a far more lenient attitude toward the mergers as a factor affecting price agreements than it has toward trade associations, and Mr. Thurman Arnold and Willard Thorpe had a passage—interchange of view on that subject only a month or so ago, so the subject is still a live issue.

By Mr. Leisure:

Q. Do you offer that, Mr. Fetter, as an explanation of what you thought in 1930,—something that happened last week?

A. Oh, no, I have already indicated that I reached that conclusion as a study of all the available material before me at the time, and that events since have served rather to confirm that conclusion.

Q. When you used that phrase "Janus-faced," is that a two-faced god? What is the meaning of that phrase?

A. Yes. I think it was an old Roman god.

Q. Two-faced?

A. Yes.

Q. What other students, as you have described, 17870 have you heard describe the Supreme Court of the United States as being two-faced or "Janus-faced"? What other students besides yourself have you ever seen write such a phrase?

A. Again, you are referring to rhetoric rather than the thought.

Q. Call it what you will.

A. The thought that the Supreme Court has taken this attitude—

Q. I asked you about the phrase, not the thought.

A. As far as the phrase is concerned, it is my own phrase. It is a very old, trite phrase regarding similar situations.

Q. But you are the originator of it?

A. Yes.

Trial Examiner Norwood: How about the thought? Have others had the same thought?

The Witness: Yes; as I said, Mr. Thurman Arnold and Mr. Willard Thorpe.

By Mr. Leisure:

Q. You mean Mr. Thurman Arnold, in your presence, expressed the thought that the Supreme Court was two-faced?

A. No, I am taking that from the newspaper report.

Q. And you mean from the newspaper report, you mean Mr. Thurman Arnold expressed the thought that the Supreme Court was two-faced?

A. Yes; that the attitude of the Supreme Court 17871 was not consistent on that matter.

Q. That is something else again.

Will you answer my question? Did Mr. Thurman Arnold express to you in your presence or did you read anywhere that he expressed the opinion that the Supreme Court of the United States was "Janus-faced" or two-faced?

A. He did not, to my knowledge, use that phrase and my knowledge of that discussion is based upon newspaper report but I don't believe that you question that.

Q. And you mean, now, to imply that there was something in some newspaper which you read which indicated

to your mind that Mr. Thurman Arnold expressed the opinion at any time or place or anywhere that the Supreme Court of the United States was two-faced?

A. No, he would never use that phrase, so far as I know.

Q. As to another one of your conclusions which you have expressed in your book at page 79 in which you are writing about the subjects that you testified to yesterday, the economic subjects that you testified to, where you used the phrase:

"But no; the weasel phrase 'in and of itself' served to shift the Judge's thought from the elimination of competition between and among the hundreds of concerns formerly owned and operated separately."

Do you find that there?

17872 A. Yes.

Q. Will you explain to the Examiner how you arrived at that conclusion with reference to these subjects?

A. The word "weasel" is again rhetorical as a synonym for ambiguous.

By Mr. Leisure:

Q. As a synonym for what, please?

A. For ambiguous.

The phrase "in and of itself" and the context points out specifically wherein this ambiguity consisted.

Q. Now that phrase has reference to your quotation found up on the same page which you quoted from the Judge's decision, and to which you refer as a "weasel phrase".

I am quoting from the Judge's decision as quoted

17873 by you:

"The corporation, in and of itself, is not now and has never been a monopoly or a combination in restraint of trade."

Will you take your time, Doctor, and explain, now, to the Examiner just how that expression as used in that sentence by the Judge is in any wise ambiguous or how you were justified in any way in calling it a "weasel phrase"?

A. A phrase which shifts from one thought to another thought is an ambiguous phrase.

Now the phrase used by Judge Woolley; there are two expressions used by Judge Woolley and the first one is on page 78 in which he said, "The immediate, as well as

the normal effect, of such combinations, was in all instances a complete elimination of competition be-
17874 tween the concerns absorbed and a corresponding restraint of trade."

And with reference to the super-combination that occurred, he later says that, "It is not now and has never been a monopoly or a combination in restraint of trade."

Now to my mind that was an inconsistency and it seemed to hang on that phrase "in and of itself" as if that changed the whole effect of the combination.

By Mr. Leisure:

Q. Now the phrase which you have used refers to the last quotation from Judge Woolley, does it not, the phrase you have used, "weasel" phrase.

A. It refers to that one phrase that occurs in the last quotation, "in and of itself".

17875 Q. You have another conclusion, and I would like to ask you how you arrived at it, Doctor.

On page 343 of your book where you are discussing these same economic problems which you discussed yesterday on direct, and you comment there, on page 343 of your book, "The Masquerade of Monopoly;" upon the dangerous gift of casuistry possessed by the Chief Justice of the Supreme Court of the United States."

Did you mean, there, Doctor, by the phrase "dangerous gift of casuistry" that, in your opinion, the Chief Justice of the Supreme Court of the United States had a shallow, illogical mind, or did you mean to imply the more modern or usual definition of the word he had been guilty of false reasoning, in the common, ordinary accepted
17876 sense.

Mr. MacIntyre: We protest that Mr. Leisure has not correctly quoted the passage from the text.

Mr. Leisure: Now, Doctor, let me read the exact phraseology so we will not have any disputes of that kind.

17877 Trial Examiner Norwood: All right.

By Mr. Leisure:

Q. Page 343, let me direct your attention to the first sentence in the first paragraph:

"Chief Justice White, with his dangerous gift of casuistry—"

That is accurately quoted, is it not, Doctor?

A. Those are the words, yes.

Q. Yes.

Trial Examiner Norwood: Was that discussing the "Rule of Reason" case?

Mr. Leisure: No, Your Honor, it is the Standard Oil case.

Mr. Wooden: No, this is the "Rule of Reason" case.

The Witness: This is the "Rule of Reason."

Mr. Leisure: Yes.

Mr. Wooden: Yes.

Mr. Leisure: Yes, that is right.

Trial Examiner Norwood: Go ahead.

A. I would not be willing to confine myself to the alternatives or the meaning of "casuistry" that you give. What I probably had in mind was the rather subtle scholastic type of reasoning that was characteristic of Chief Justice White. I had heard that view of him expressed, I am sure, frequently by lawyers, a very able and acute mind, but too subtle at times.

17878 By Mr. Leisure:

Q. Do you agree with this definition from Webster as to "casuistry."

"Sophistical, equivocal, or false reasoning or teaching in regard to duties, obligations, and morals."

A. No, I think I did not mean it in any such—have any such thought regarding it—that is, anything of intention, wrong intention, or wrong purpose—subtle.

Q. Did you feel that he was dangerous? Whom did you feel he was dangerous to, Dr. Fetter?

A. Any false thinking is dangerous, and I felt—

Q. Then you do feel that he was guilty of false thinking?

A. Every false decision given by a Judge is dangerous to the public welfare.

Q. And you felt that he was guilty of false reasoning in this instance?

A. Yes, and some of his colleagues thought he was.

Q. And that is what you meant when you used the expression "dangerous gift of casuistry"?

A. Yes, as I have explained it.

17880 Q. Now, again, Dr. Fetter, on page 418 of your book, where you were considering similar problems of economics, which you considered yesterday on your direct examination, and while referring to the Supreme Court with respect to those questions you referred to the

Supreme Court—let me quote: "Supreme Court's hesitating answers."

Will you explain to the Examiner how you arrived at your conclusion there as to the "hesitating answers" of the Supreme Court, in that matter?

17882 A. As explained in the context in that same paragraph by—and that was the result on my part of very considerable study of the various cases that are there mentioned, and doubtless some other cases.

By Mr. Leisure:

Q. And have you any other explanation other than simply referring to the book—can you explain any further as to what you meant by its "hesitating answers,"—what that applied to?

A. It is explained in that same paragraph.

Q. Yes. Could you tell us what it applied to?

A. Well, it (referring to book)—it refers to the Winslow case, the Keystone Watch case, the United Shoe Machinery case, and finally the Steel Dissolution suit, cases coming up between 1912 and 1920.

Q. How did you reach the conclusion, Doctor, that the answers of the Supreme Court were hesitating answers in those cases?

A. By observing that it did not give a final and conclusive and unambiguous reply to the issues involved.

Q. And by "reply" you mean the decision did not?

17883 A. The decision, yes, decision.

Q. Yes.

Q. Are you enthusiastic on this subject of basing point, Dr. Fetter?

A. I think that would be a misleading adjective to apply. I feel very strongly the importance of the subject.

17884 Q. Yes.

A. It is a great issue, and that it is not yet decided, as you well know, as a matter of public policy. I feel that every serious student of the subject should give it all the consideration in his power.

Q. Now, prior to the time that you had written your book finding fault with the basing-point system, namely, "The Masquerade of Monopoly," can you refer me to any other writer that had ever found any fault with the bas-

ing-point system prior to the time that you, yourself, wrote this book?

A. Professor Commons wrote an article which appeared in the American Economic Review, on—I think it was called "Delivered Prices in the Steel Industry," published in 1924.

The Reporter: Will you spell that name, please.

The Witness: Commons, C-o-m-m-o-n-s.

Mr. Wooden: Will you give his full name, please, Doctor?

The Witness: John R. Commons.

By Mr. Leisure:

Q. Did he mention the basing point and criticize it in that article?

A. Yes, distinctly, yes.

Q. And that was—

A. It was more an expository than an argumentative article. He had—he and I had been associated, see, 17885 in the Pittsburgh-Plus proceedings.

Q. Now, other than you and your associates, can you give me the name of any economist of standing who found any fault whatever with the basing-point system?

A. In any writings?

Q. Prior to the time that you started writing on it.

A. No, it was—there was a strange lack of literature on the subject.

Q. Yes.

A. The economists were most—quite oblivious to the revolutionary changes that the basing-point practice had introduced into American business.

Q. Well, now, you have indicated that my description of your interest in this subject as one of enthusiasm, as not being a correct statement. Let me refer you to the foreword of your very book, "The Masquerade of Monopoly," which starts:

"The realm of monopoly has remained, despite repeated attempts to penetrate it, a sort of terra incognita, a darkest Africa."

By the way, "terra incognita," if you had wanted to continue writing in your own language, could you have said "unknown land"?

A. Yes, I might, but—

Q. Let me continue.

A. —but I was writing it, and not you.

17886 Q. "The realm of monopoly has remained, despite repeated attempts to penertate it, a sort of terra incognita, a darkest Africa of our industrial life, where dwell wild beasts and monsters grim, and where strange commercial customs all discriminatory prices and illicit agreements flourish out of sight of the law and of the moral order."

Do you get from what I have read thus far, Doctor, a sort of rumor of grilled American manufacturers in darkest Africa?

A. I—I am inclined to think that most people that read that first sentence go on reading. That was the purpose.

Q. To go on, as you have suggested, Doctor, the foreword reads further:

"The courts in their attempts to explore this dark wilderness became lost, a generation ago, and have not yet been able to find their way out. Their 40 years wanderings are faithfully traced in the following pages."

17887 So, Doctor, as I read this foreword you intended by the use of this book to lead all the courts out of their morass of befuddled reasoning into the promised land of perfect competition. Was that your purpose?

A. That was not.

Q. Now, I notice in addition to your prologue you also have a foreword, in this book "The Masquerade of Monopoly,"—the other way around, you have a prologue after the foreword, at page 14, and in that prologue you say:

"As our story proceeds we shall see, (among other things) how the Federal Trade Commission wavered and blundered, though at last it began to grope its way out."

Dr. Fetter, just when did the Federal Trade Commission start to grope its way out?

A. I think during the Pittsburgh Plus affair.

17889 Q. You say at page 33 that "the Supreme Court has been thought at times to display a somewhat jealous spirit toward its rival The Federal Trade Commission."

Do you honestly believe, Dr. Fetter, that the Federal Trade Commission is or even pretends to be in any way a rival to the Supreme Court of the United States?

17890 A. I think it has been so considered. It was created as an amendment to the Anti-Trust Law.

The Clayton Act and the Federal Trade Commission were so considered, and the Federal Trade Commission then undertook certain duties connected with the revised Anti-Trust Laws, and the Department of Justice continued to exercise certain other duties.

Trial Examiner Norwood: Well, does that passage refer to the Supreme Court or some other Court,—or to the Department of Justice?

The Witness: This refers to the Supreme Court.

By Mr. Leisure:

Q. Let me read it.

Mr. Leisure: I have just one more question, Judge, after I read this.

By Mr. Leisure:

Q. The quotation reads as follows, does it not, Dr. Fetter:

"The Supreme Court has been thought at times to display a somewhat jealous spirit toward this rival created by the new legislation of the early days of the Wilson administration."

Do I correctly quote you?

A. That statement is there, yes.

17891 Q. Yes.

Now, who was it that thought the Supreme Court at times displayed a jealous spirit toward the Federal Trade Commission?

17892 A. I do not recall the names of the persons or writers or authors whom I had in mind at the time, but it was in the first few years of the decisions of the Supreme Court that there was that impression the Gratz case and a few others.

By Mr. Leisure:

Q. When you say there was that impreession do you mean there was that impression in your mind?

A. No, I am not—

Q. Then whose impression was it?

A. I said "has been thought, at times." I think it was very wide-spread.

Q. Can you give me one person that thought that?

A. Indeed, my own view on the matter, although I think it is not expressed here, it may not be pertinent, was that the Commission began with a good deal of uncer-

17893 tainty as to what its duties were. If it was constituted almost entirely of lawyers instead of economists.

Q. You are not answering my question as to who thought it, Doctor.

A. I think it was very wide-spread.

Q. And can you give me the name of one person that thought it?

A. I cannot.

17898 Q. And, from what you have said, both in your testimony and in this book, would it follow that it was equally an absolute monopoly if instead of a group united as one person, as you have described, you had only one seller, instead of the group.

A. I think that would be a monopoly if it give them control over price. As I said, that is the limiting case.

Q. Now, may a monopoly also be created by the

17899 State, as, for instance, the result of a grant, such as a patent or a trade-mark?

A. Certainly.

Q. Yes. Or may it be brought about by any factor that in a particular area produces only one seller?

A. That is a very vague question, but taking a

17900 chance that it is meant fairly, I will say "yes."

By Mr. Leisure:

Q. To the extent that you have described, there is only one seller in a particular territory; that seller has a monopoly of that area? Is that what you mean?

A. I would recognize that there might be a limited monopoly and not necessarily an absolute. In fact, an absolute monopoly under those circumstances is almost inconceivable.

17904 Q. When there is only one seller available, then every prospective purchaser has to go to that one seller in the area we have been discussing?

A. Yes. Within that area, within certain limits of price.

Q. And as you have said, such a seller, therefore, has a monopoly, limited, of course, by the area in which he is the only seller, as you have already put it.

A. Shading off at the edges by geographical competition.

Q. So, then, isn't it a fact, Doctor, that the essential condition that distinguishes monopoly from competition is the buyer's lack of power of substitution of one seller for another?

A. Well, one thinks of competition as a two-sided affair—

Q. Will you answer the question and then explain, if you will.

Trial Examiner Norwood: Read that question.

(Question read.)

A. I think I could answer that in the affirmative; yes.

By Mr. Leisure:

Q. And would you say, to have a complete com-
17905 petition it is essential to have the presence of many sellers in the market?

A. Yes; to have it complete and entirely effective, according to the economists' ideal.

Q. And according to the economists' ideal there are certain external conditions such as the presence of other sellers which are essential to what you have just described as complete competition, are there not?

A. Yes.

Q. Therefore, it follows, does it not, from what you have said, Doctor, that you cannot have complete competition with only one seller in a market?

A. No, we can't get perfection. We may desire perfect competition, but we rarely, if ever, get it, in the fullest sense of the term.

Q. When you say "no", Doctor, in answer to my question, you mean that you cannot get complete competition with one seller in the market: isn't that what you mean to say?

17906 A. Yes. We have to take the best we can get as a matter of social policy.

Q. Now, you have outlined in your book, the book we were discussing this morning on these principles, page 262, "Masquerade of Monopoly," the subject of markets. I note that you have outlined what you consider to be the essential conditions of the true market. Page 262, Doctor, if you want to refresh your recollection.

A. (Witness consults book.)

Q. Now, is it your opinion as to these essential conditions for a true market you must have freedom of access?

A. Yes,—I don't retract anything here.

Q. No.

A. It is useless to go through these pages.

Q. That is right.

A. Yes.

Q. In fact, you have said there, have you not, Doctor, to quote you,—page 262:

"Freedom of access. A market is a meeting place where two groups of persons come together for the purpose of trade, some bringing sales goods, things that they would like to sell, and others bringing price goods, which may be money," stars, "anything that keeps a trader from coming, if he would, to the place where others are trading there to trade under the same conditions, possible to others,
17907, is an interference with freedom of access to the market, and to that extent limits or destroys a true market."

Is that correctly stated, Doctor?

A. There was—you misread a word or two, I think, accidentally.

Q. Now, what ones? Let us get it right.

A. (Witness refers to book): Just a moment—"It may be money," and you said something about stocks there.

Q. "It may be money," and then I said "stars."

A. Oh, stars, stars.

Q. Asterisks.

A. Stars.

Q. And I skipped on to the next sentence: "Anything that keeps a trader from coming," comma.

A. Yes.

Q. Otherwise, is that a correct statement?

A. That may be the only thing—that may be the thing I meant.

Q. Is that a correct statement of what you said?

A. I think so, yes.

Q. Does that correctly state your views on that subject?

A. This, of course, is a definition of the true market.

Q. Yes, precisely.

A. In the sense of an economic ideal.

Q. Precisely.

17908 A. Yes.

Q. Now, if the goods to be sold are well known as to quantity and quality, there is no necessity that the seller bring them physically to the market, is there?

A. Well, the matter of the physical delivery of the goods comes, and this matter we are describing here is one where the goods are sold freightless at the place, and some—

Q. And those were—

A. (Resumed) And some adjustments, of course, would have to be made for that, or it would not conform to the picture that is drawn here of the true market.

Q. Do you mean by "freightless" that was in the days prior to freight rates and steam power in this country, and so forth?

A. Oh, it is also possible in many cases today.

Q. Yes?

A. The markets, the produce markets, mostly for agricultural products, and mineral products, and furs, and various things of that kind are all on the principle of the medieval markets where the goods were brought to a single place.

Q. Now, to get back to my question, Doctor:

"True, when they used the goods, there would have to be delivery, but the point of my question was as to the market where the sale was made, when they are purchasing and selling goods, as you describe here in a true market.

17909 A. Yes.

Q. I have said that where the goods are well known as to quantity and quality, I have suggested to you that there was no necessity that the seller bring them physically in order to make the sale, if he brought a sample, or something similar. I want to know whether you agree with that.

A. Certainly, it is not necessary to bring the goods physically if arrangement is made for the delivery; but if the price is made at any place where all buyers are allowed to come and be treated in the same manner at that place, then, of course, provision has to be made for a difference in the treatment regarding delivery.

Q. But in answer to my question—have you answered in the affirmative or the negative? I do not care which way you answer, Doctor, only I want an answer.

A. Yes.

Q. Would it be, in your opinion, necessary, where the goods are of one quantity and quality, to have them brought physically to the market place in order to consummate a sale?

A. No, but it would be necessary in order to have a uniform market price; otherwise—

Q. I am not talking about—

A. —you wouldn't have a uniform market price.

Q. I am not talking about uniform market price at the moment, Doctor; I am merely talking—

17910 A. I know, but I am safeguarding my answer.

Q. And your answer, I believe, was "no"?

A. No, regarding the physical goods.
Q. Yes.
Now, I suppose another one of these essential conditions of a true market would be common knowledge, would it not, Doctor?
A. Yes, that is a condition well recognized by the Supreme Court in 1925.
Q. And would it or would not another essential condition—before I take up another essential condition, to be sure that we understand each other on common knowledge,—would you say that common knowledge amounts to publicity of transactions and prices, and implies a general understanding on the part of all traders both as to kinds and as to quantities of goods offered for sale, and as to the number and needs of the persons wishing to buy?
A. That statement is there, yes.
Q. And that is a correct statement, is it not?
A. I thought so.
Q. You think so now?
A. Yes.
Q. Yes?
A. I said I have not, so far as I know, recanted any of these statements.
17911 Q. Yes.
Now, freedom of competition would also be an essence of the true market, would it not?
A. It would.
Q. Yes. And, as you have stated at page 263 of the same book, "The Masquerade of Monopoly," "in a true market there must be the condition of freedom of competition and trading,—this is a continuation of that freedom that gives access to the market. Any influence or pressure from others compelling a trader to act, or restraining him from acting, otherwise than as he would like to act if left to the guidance of his own interests, is an interference with freedom of competition and makes the market imperfect."
Does that appear in your book—
A. It does.
Q. —as I have read it? Sir?
A. It does.
Q. Yes.
And that is a correct statement, is it not?
A. Yes.

Why do I need to reiterate it? I have said that I have written all of this, and I have not recanted it, as far as I know.

Q. Yes.

Another condition, I suppose, to the true market

17912 would be two-sidedness,—would you not say so?

A. Yes.

Q. Will you just tell us whether I quoted you correctly on page 263 when I read the following:

"In a true market, competition must be two-sided; if the sale goods are all held by one seller (or controlled within certain limits by a combination of sellers) then the competition is one-sided on the buyers' side only. Conversely, if there are numerous sellers and but one buyer (or one united group of buyers) there is one-sided competition on the sellers' side only."

Does that correctly state your statement in the book, sir?

A. That is there.

17913 Q. And I suppose another essential of a true market, another essential condition, would be capability of competition, isn't that right?

A. That is.

Q. And by capability of competition do I correctly describe that term when I say that it means the capacity of economic subjects to perform the services or produce the goods?

A. Yes.

Q. Then, in order that we may have the true market, you regard as essential these five things, Doctor: Freedom of access, common knowledge, freedom of competition, two-sidedness of competition, and capability, is that correct?

A. That is.

Q. And when those five essentials appear do you or do you not have effective competition?

A. I think you do; or would.

Q. And you regard these conditions as desirable from an economic standpoint, do you not?

A. Yes, and all of the public legislation and public policy of the Middle Ages was directed toward establishing as nearly as they could these conditions.

They never can be established fully, but they tried to approximate them and a matter that is of equal interest

to the lawyers and economists, the old practices and
17914 the old statutes through the Middle Ages were directed toward creating as nearly as they could this kind of a market to which they could have free access.

They were protected in so many ways, as you know; given freedom from levying on their goods, and other privileges; forestalling was prevented so as to make them come and trade at a common place; so as to make it impossible for the seller to break the buyers up into little groups in a regrading, or vice versa; sellers breaking the buyers up into little groups.

I think that is more or less the whole key to our history of the Anglo-Saxon law and public policies on those matters.

17927 Q. Now, as I understand it, these markets which you have indicated as being ideal markets are markets where competition reached its height.

I am now referring to the medieval market or the early markets in this country, they were places where goods came to be sold and where buyers congregated to purchase.

A. Yes, that is true.

Q. And it is a fact, is it not, and is it not your opinion that it is a fact, that economic competition appears at the point in time where goods come to be sold and bought, and that economic competition began with markets and grew as markets grew?

A. That seems to me to be familiar.

Q. Yes. And that is your opinion, is it not, now?

17928 A. Yes.

17929 Q. Then, in other words, every real market, as I understand you, is a concrete thing, an actual place where traders gather to which actual goods or certificates of ownership are brought for sale and delivery; where special facilities for trade exist, where buyers and sellers alike have opportunity to learn the amounts and quantities of goods present, and the probable intention of other traders. Is that correct?

A. That is—and I think that I testified yesterday—that where the basing-point practice is in use there is no real market.

17930 Q. Regardless of all that, Doctor, is the market a place, is it an actual place of meeting?

A. I think, in order to constitute—we can really call

it a market; I would so call it. I think it would have to be an actual place to be a real market.

17933 Q. Now, one of the other conditions which we discussed a moment ago with reference to a true market was two-sidedness. When you use the term "two-sidedness" do you mean that there must be a large number of buyers and a large number of sellers in a particular market to meet this essential condition?

17934 A. There must be more than one. Some economists insist that unless there are a very considerable number on one side that it would be ineffective.

The question as to just where it would be effective, whether two, or three, or four, or five, I think, is a practical question.

Q. Then the more buyers and more sellers you have would be beneficial in that direction, would you say?

A. Oh, yes; surely.

Q. I mean by that, you feel it would be better, of course, to have a large number of sellers rather than having a small nber?

A. would be more effective for competition in price. I don't mean it would be more efficient in production, necessarily.

Q. Now when you have all of these five conditions which you have outlined from the medieval markets and the early markets, in your own experience, when you have all five of them existing, do you or do you not expect a uniform market price for each article to result?

A. Yes, in the market where the competition is taking place that is general economic doctrine.

Q. That is, when all of these conditions are present the law of supply and demand fully operates, and uniform market prices result?

17935 A. Yes.

Q. Is that a fair statement?

A. Yes.

Q. And would you say that it is the essential proof of a true market that there is but one price at any moment; a complete or typical market may refer, be defined as "a group of closely communicating traders whose valuations • • • unite for a moment into a single price?"

A. Yes, I think that is a general statement.

17944 By Mr. Leisure:

Q. What is your opinion, Doctor, as to the eco-

nomic soundness of a situation which restricts the manufacturers to those points at which with a single mill price plus freight they can quote a price less than that of any other manufacturer of the same product?

A. I think it might be sounder than the present conditions, or practice.

Q. And is that all you have to say as to the economic soundness of such a situation?

17945 A. I think that is sufficient.

Q. All right.

Now, you will agree, will you not, that this would mean in most manufacturing industries where plants are scattered that buyers would have no choice among sellers except where they were prepared to pay a higher price to a more distant seller?

A. Yes, it would limit the areas, as exactly as is done around the most competitive markets; around competitive markets the area from which customers can be drawn is limited.

Q. And would it mean, or would it not mean, that, in many instances, the buyers would have no choice except to buy from a single seller?

A. That would undoubtedly be true, in some cases.

Trial Examiner Norwood: What would determine the limits of price in such situations?

The Witness: The—as it was shown yesterday in the testimony—the present limit of price is what the traffic will bear, and, so far as I can see, the limit of price there will be what the traffic will bear plus a sort of competition which you do not have now, sales allocating price competition on the border. You do not have that now because under the system of identical delivered prices no matter how high a mill puts its base price it does not cut itself out of

17946 any portion of the market area. It can still bid at the identical price of its—of the neighboring mills.

By Mr. Leisure:

Q. And in using the term "what the traffic will bear," you do not confine that to any one industry, as far as selling its products are concerned, do you?

A. That is a general monopolistic principle.

17948 Q. As I understand, your "charging what the traffic will bear" is in no way confined to basing-point methods of selling?

A. No.

Q. Would you or would you not expect exorbitant profits in a basing-point industry since, as you say, it
17949 charges what the traffic will bear?

A. No. That is one of the most puzzling features about it.

17954 Q. Using the term "true market" as you use it, can you, in your opinion, have a true market for any product at any point except where the buyer and seller actually meet?

A. No, I think you could not have it in the sense of this true market.

Q. And that being true, would it, in your opinion, be perfectly proper for either the buyer or seller to be represented by a representative or agent?

A. Oh, yes, they are, in the most nearly perfect markets that we have, the produce market; produce commission men.

Q. And would the fact that the buyer or seller acted through an agent affect, in any way, the essential conditions in the requirement of a true market?

A. Not if the transaction were all occurring in this limited area where there was a common knowledge.

17955 Q. It is true, isn't it, Doctor, that either the buyer or the seller, if either of them were a corporation, that is the only way they could act; isn't that true?

A. Well, a corporation has to act through a person.

Q. Yes.

Now, I think you agree that common knowledge was a condition to a true market.

A. Yes.

Q. And by "common knowledge" do you mean complete information as to prices, supply, and so forth, by all buyers and sellers?

A. That, again, is the ideal, which is never completely realized.

Q. Although it is not completely realized, would the greater approach toward common knowledge on the part of the buyers and sellers create a greater approach toward full competition, in your opinion?

A. Yes, if there was full access to the market.

Q. Then, is the converse true, in your opinion? Does it follow that everything which tends to prevent such com-

mon knowledge would interfere with true markets and free competition?

A. Yes; I think so.

Q. Is it important one way or the other whether such knowledge be definite and certain?

17956 A. Yes, and should be known to both parties, both sides, of the bargaining.

Q. Now, as to these markets that we were describing before we took up the theory of true markets, the

17957 old English fairs, or the later American markets, which you have described as the ideal markets, each seller brought, did he not, his goods along with him, salt or furs or wool, or whatever it was he was selling in the market?

A. Yes.

Q. Now, would you say that the seller or someone else transported his wares from the place where they were produced to the market?

A. The seller brought them to the market, and transportation was a past fact when they were offered for sale.

Q. So that whatever expense was involved in this transportation to the market, that was a cost borne by the seller?

A. Historically it had become a cost before they were offered for sale.

Q. But it was borne by the seller?

A. Yes. All costs must be borne by the seller before the sale is made.

Q. Now, in that situation, when the seller came to sell his wares, would he or would he not be justified in taking into consideration the transportation expense to which he had been put to on account of bringing his wares to the market?

A. Yes; all past historical costs were taken into

17958 account, in the sense that the seller would like to recover them, if he can.

Q. In other words, he would not ignore this transportation?

A. No. All business is made on the basis of expectations, and unless he looked forward and had what seemed to him good reason to expect that the price for which he could sell them would cover all those items, he would not take them there.

17959 Q. Plus a reasonable profit?

A. Yes. There is often a quibble whether profit is outside of cost or inside of cost, but we will say a reasonable profit is inside of cost. Unless that is included—that is a part of his own opportunity costs. Unless that is included, he would not take them to market.

Q. He would not sell them?

A. I mean that he would have some other use for them that, by his calculations, would bring him a larger return.

Q. Now, when he found that other sellers of identical goods had come from nearby, let us say, and had therefore little or no transportation expenses, would he be obliged, in your opinion, to meet their lesser price at the market place?

A. Yes. If it is an open market, he has to meet the price. We discussed that term "meet." I think it is all right to use there. He would have to meet the price. He would have to receive his price, if necessary, to keep from being cut out of a sale.

Q. And you would not contend, would you, Doctor, that if the seller did so reduce his price, that he would, in so doing, lessen the competitive character of that market in any way?

A. Not the competitive character of that market, no.

17961 Washington, D. C.,
March 23, 1939.

17973 DR. FRANK A. FETTER thereupon resumed the stand and testified further as follows:

*Cross Examination by Mr. Leisure (Continued).*

Q. Dr. Fetter, when the hearing was adjourned yesterday, we were discussing markets and price.

Assume that the different cement companies selling in Washington each made its price by adding the full amount of freight to its mill price, and did the same at all other points where they sold, there would be no discrimination in such sales, as you call it, would there?

A. If I understand it, there would be no discrimination as among the customers of each mill respectively.

Q. That is right. And in this case you would not criticize—

A. That is, of course, assuming that that is the same treatment that they are giving to their other customers.

Q. Yes.

I am not assuming anything outside of the question, just as I stated it.

Mr. Wooden: Read the question.

Trial Examiner Norwood: Read the question.

17974 (Last question read by Reporter.)

A. I think that covers it, yes.

By Mr. Leisure:

Q. And, in that case, you would not criticize their selling at such prices?

A. No.

Q. Now, assume that different mills offering cement at, say, Washington, added respective freights to the respective mill prices, in that case the delivered prices would be identical, would they not,—I mean, would not be identical, excuse me.

A. Would not be identical?

Q. Yes.

A. No.

Q. If they added the different freight rates to the same mill prices, the delivered prices would not be identical?

A. That is true.

Q. Yes.

So that the different mills would be offering cement in Washington at different prices, if that were done?

A. Yes, if they cared to offer.

Q. Yes.

Now, assume that at one time and place all standard Portland cement is identical in value, in the ordinary commercial meaning of the word, and is being offered in Washington at, say, $1.50 by one seller, could other sel-

17975 ers secure sales if they offered their product at, say, $1.60?

A. No, they would have to offer it at a price to sell in that—at that destination.

17976 Q. So that the other sellers must at least meet the price of $1.50 or stay out of the Washington market?

A. Yes, but that is not a market—

Q. Now, that is—I am coming to the subject of whether it is or not, Doctor, later.

A. Yes.

Q. Now, I think you said during our discussion yesterday of markets, that, in your opinion, it would be better to have more than one seller in each market.

A. A highly desirable ideal, yes, if it is practically possible.

Q. That is not merely your opinion, but where there is but one producer at a locality, all economists would recognize it as a case of local monopoly, would they not?

A. Yes. As I said yesterday, this isolated seller
17977 has a certain latent monopoly power.

Q. But, as I understand you, Doctor, you feel that the seller should stay out of Washington and not meet the price of $1.50 unless they are willing to net the same amount on all other sales at other points?

A. That would be most nearly preserving the conception of competitive markets over a geographical error.

Q. And to give me a direct answer as to whether that is the way you feel—

A. Yes.

Q. —that is your feeling?

A. Yes.

Q. So that your real objection to their meeting the price at Washington is that it usually, as you say, is accompanied by other sales elsewhere on which a greater amount is netted?

A. Yes. Of course, you are using the term there "meeting the price" in the sense which I criticized—

Q. Well, if you have any other phraseology you would rather use for "meeting the $1.50"—

A. Yes.

Q. —"price"—I will accept your term.

A. I would really say giving a competitive price, that is, those mills that are so situated that they can undersell the more distant mills would be really competing, if they would quote one or two cents a barrel less than the
17978 price at which they are trying to sell. Merely matching the prices means that the various sellers are suspending competition with regard—

Q. You told us that on your direct examination.

A. Yes.

Q. Yes.

A. That is simply repeating the thought.

Q. Yes.

Now, in your opinion, in view of what you have said this

morning, which is the more economically desirable, to have only one seller in a given market, which you have said is not the best economic idea, or to have a number of sellers all but one of which would realize varying mill nets?

A. Which is the more desirable?

Q. From an economic standpoint.

A. I think it is more desirable to have each mill sell at a uniform price at the mill.

Q. That is another discussion, Doctor.

Trial Examiner Norwood: Yes.

Read the question, please.

(Last question read by Reporter.)

A. It is more desirable to have, in view of the whole situation, and of the effect upon base prices, as I have discussed in a different connection, I think it is more desirable not to permit this local geographical discrimi-
17979 nation in prices. You have to choose between the two.

Q. Then, do I understand you to say with reference to any specific question, that you feel it is better to have only one seller?

A. Yes, because the alternative gives you only one price, which is not competition. One price from sellers differently situated having very different costs to incur.

17986 Q. Now, suppose we discuss cement for a moment, Doctor, and assume that we start with only one cement mill in the United States, and let us say in the Lehigh Valley, where there are raw materials; and further assume that the mill, which we will call Mill A, is selling its product at a certain mill figure plus freight to destination. Now, assume that a second mill is established at, say, Osborne, Ohio, where there are raw materials, and this mill, which we will call Mill B, finds Mill A selling cement at Osborne for, say, $2.

If Mill B accepts the prices that it finds Mill A quoting in Osborne and elsewhere and it quotes the same price, then Mill B would have the status of a non-base
17987 mill, would it not?

A. Yes.

Q. And if Mill B began selling on this basis of A's price quotations, would that fact alone indicate any lack of competition or collusion between the two mills?

A. No, it would not at that point, if there was no mutuality of action on the part of the original Mill A. It would, of course, involve discrimination among the customers of Mill B.

Q. Now, it could be simply the result of B's own decision, could it not?

A. Yes, it could, because B at that distance is in a monopolistic position; that is, it has a degree of local geographically graded monopoly power, which it would exploit in this manner.

Q. So, then, it follows, Doctor, that selling as a nonbase mill does not per se indicate any collusion?

A. No, if it is not part of a system where there is any mutuality.

Q. Now, suppose, Doctor, when this Mill B comes along, assume that it decides to put in a different scale of prices based on a price in its own mill; in other words, it becomes a base price mill, would you say it could do this without any collusion or lack of competition with Mill A?

17988 A. Yes; I think indeed that would be a step away from collusion; it would be an indication of its independence.

Q. Now, suppose Mill B got another idea, and in order to operate more nearly at full capacity finds it necessary to sell in the territory in which Mill A is fixing the price, that is, by making sales with so-called freight absorption, would you say that this indicated cooperation with Mill A, to use your phrase on direct, "tantamount to an agreement"?

A. Not unless Mill A passively accepts that situation.

Q. Mill A is very unhappy about it.

A. Yes.

Q. Let us assume that as part of my question.

A. It would not make any difference if it were unhappy. If it accepted it and refused to compete and exclude Mill B. Now, if Mill A values the customers in that territory, it will try to hold them—

17989 The Witness: —by giving them a price that would keep them from going over to Mill B.

17991 Q. But you consider that if both mills do this, that is, sell in the territory nearer the other mill X, this is evidence of collusion, as I understand you?

A. If that is mutually done.

Q. Yes.

A. If the mill whose high-priced territory is being invaded by the other mill, which is at a geographical and freight disadvantage, and this mill passively accepts that, it has given up active competition which could keep the other mill—each mill could keep the mill out of its territory by reducing its price, either its mill base price or by actively reducing the price to the particular customer that was likely to be lost.

Now, that would involve discrimination, and I am not speaking of the legal aspect—

Q. Never mind.

A. —as to whether that would be legal.

17992 Q. I am not talking about discrimination any more.

A. But it could do it.

Q. Yes.

A. It could do it, and that would assume the appearance of competition.

Q. Now, you say "passively accept it." Let us assume a practical situation.

Let us assume it does not passively accept it, but that mill X does sell in its territory,—do you still say that that is, in your opinion, evidence of collusion?

A. Yes, because both mills would be doing the same thing, each one would be exercising that right with the assurance that the other mill would follow the same practice. Then you are getting the basing-point practice, namely, mutual dumping across this line into each other's territory, and thereby realizing smaller net prices. And I notice that when you use the term "reduce their price," you apparently meant reducing the net mill price?

Q. Yes, I did.

A. Yes.

Q. Do you feel that this mill X could not sell in this territory Y without realizing that Y would do the same thing,—you could not have a vigorous mill here that had the idea of selling over in Y's territory?

A. Oh, yes, you could have it, but that would be a

17993 sporadic and individual discrimination, and then, if I may speak of very common experience, I think that would lead to what you call cut-throat competition, an unsystematic unregulated sort of competition, in which each one is trying to get a part of what we would call the

natural territory of the other one, and either one, if they are equally shrewd and successful, neither one is actually increasing its production or increasing its capacity, because there is nothing in that that increases the sum total of consumption of cement, or whatever the product is.

Q. But when one—

A. But simply—simply trespassing upon each other's higher-priced territory, and the customers are not gaining one penny by that process.

17994 Q. And you feel that this selling also in X and Y's territory by the other mill, each selling in the other's territory, produces economic waste of cross-hauling?

A. Yes, and other wastes.

17995 Q. Do you consider that to limit each of these areas with only one seller tends to produce any truer markets, Dr. Fetter?

A. Yes, it is a step, and a pretty long step nearer.

Q. Well, now, have you not told us at some length, both on direct and cross-examination, that one of the 17996 essential and necessary conditions of a true market is to have more than one seller?

A. Yes, it is, and that condition is, in a sense gone forever—

Q. Yes. You realize—

A. —in certain situations.

18004 Q. I do not want to hold you to the text book principle; I just want a simple answer.

Would you say that the only general rule of price is that every commercial seller gets all he can, when- 18005 ever he can, sentiment apart?

A. Looking at merely the individual seller, that is correct.

Q. What does that qualification mean?

A. It means that that is not a statement of the whole law of supply and demand.

Q. Qualify it so that it will be a correct statement.

A. Because you have to consider all of the sellers, each one trying to get the highest price, and in turn all of the buyers, each one trying to get the lowest price.

Q. Having considered all those things, how would you change that answer?

A. Then I would say that that statement which you gave me refers to only one aspect of a larger market prob-

lem. It is not a statement of the whole market operation. It is looking at the thing from the standpoint of the individual seller and his interest.

Q. That is what the question was about.

A. Yes. Very well, then; I say that is a true statement, I think.

18013 Q. Now, take these same two mills, X and Y, each a base mill, selling in each other's territory, as we have discussed, could they, in your opinion, change this method and adopt a plan of selling only in their respective territories without collusion or understanding between them?

A. You mean could they make the change without collusion?

18014 Q. If they are selling in each other's territory, as I have described, could they cease doing that without collusion between the two?

A. Yes, they could, if they were permitted to.

Q. Did you say, in recently testifying before the T.N.E.C., the Monopoly Committee, March 7, 1939, that they had gotten into an impasse, an uneconomic practice, from which individually and separately they were unable to extricate themselves?

A. I have not read the transcript of the testimony, but that seems to be—

Q. Do you recall making that statement?

A. I recall making the statement, yes.

Q. Now, when a change in a business practice, such as the method of selling, is under consideration, would you expect a producer to make such a change unless it were one that yielded him an immediate advantage over his competitor?

A. No, I would not, if it were purely his voluntary act.

Q. If that did happen, and if one producer had adopted this change, I mean the restricting of his sales to his own market territory, would you, as an economist, expect that the other producers would restrict their territory?

A. Now you are assuming the existence of the basing-point practice in the question.

Q. You can assume anything you want, Doctor.

18015 A. Well, you are assuming the existence of the basing-point practice, and asking how it is possible for an individual—

Q. No, that is a different practice.

A. —who wanted to cease this practice—

Q. No.

Mr. Leisure: May I have the last question read to the witness?

Trial Examiner Norwood: Read the last question.

A. Now, that evidently is the present basing-point practice, and, therefore, your question must refer to that. My statement referred to that solely, and it was the question of how, when this practice was invoked, it would be possible for an individual, or the separate company,

18016 as I said, to extricate itself, unless the others all did the same, unless there was simultaneous action, the individual— .

Now, if I may explain this? The thought in my mind is this:

That the individual might try to extricate himself, but as long as the right to territorial dumping is exercised, if it be a right, by other mills, they have ways of punishing him and of disciplining him, and of making it impossible for him to maintain a separate individual mill policy.

18018 Q. Now, if the other producers did not follow, would not the producer initiating the change lose business to the other producers?

A. Yes, I think he probably could be ruined if they were financially stronger than he.

Q. And does that answer mean "yes" that you think that they would?

A. Yes, I said "Yes," I think that they would—

Q. And this loss of business would cause the first producer to return to his original method of selling, if he were wise, would it not?

A. Yes, it would, he would be attempting to oppose the will of certain powerful influences in the industry.

Q. Now, assume, Doctor, that—without assuming parts in my question which I did not incorporate in it—assume there were no expressions of will at all, there were just the plain practical facts of staying out of their territory while they stayed in his,—can you answer that without assuming anything else?

A. No, if dumping is permitted on one side, and legal, and accepted, the other man would have to do something to protect himself, and come into the game.

As a matter of fact, I was asked by a cement manufacturer that very question—

Q. Now—

18019 —how could you get out of this system, if you wanted to.

18020 Q. Dr. Fetter, if cement were sold by the principles that you have outlined in your direct and cross-examination, would you expect to see new cement mills built at various points?

A. Yes, I would expect some process of readjustment to go on, because of the geographical misplacement that comes up under the present system.

Q. And since you do feel that new cement mills would be built, do you feel that that would be economically desirable?

A. Not in itself, and suddenly added to the present existing capacity, and I doubt whether it would be done that way, but that, of course, is a matter of prophecy, not fact.

Q. You say as to the present existing capacity, you are assuming there is a great deal of excess capacity in the existing mills.

A. I don't want to be—

Q. Or, at least assume that.

18021 A. Yes.

Q. Let me assume that in my question.

A. Yes, assume that.

Q. Would you wish to see the excess capacity increased still further?

A. No.

Q. By the new mills.

A. No, I would not. There might be reasons that would justify it, we always have to, in practical matters, express a bromidic thought, we always have to choose the best of judgment, often a choice of evils.

Q. Now, is it or is it not a fact, in your opinion, that overhead costs of a product like cement, are very substantial?

A. Yes, indeed.

18022 Q. And these overhead costs are the fixed costs, the ones that remain unchanged whatever the size of the output?

A. Yes.

Q. That is, "fixed costs are those that remain unchanged on the business as a whole, no matter what the size of the output. There are some costs which would go

on if nothing were sold, unless the business were closed. The fixed costs are correspondingly called indirect or overhead charges". Is that correct?

A. Yes, but I want to say a few words of explanation on that.

18025 A. May I say a word of explanation?

By Mr. Leisure.

Q. Would you answer the question and then explain it, if you will, Doctor.

A. I would not include them as things to which an industry is entitled of right.

Q. Well, would there be any economic justifi-
18050 cation for changing its prices at any time through the day?

A. Oh, yes.

Q. When this steady flow of customers were coming in?

A. Yes, there might be, there is in every going market such a reason. The more flexible the prices of the market are the more complete competition, the more frequent, other things being equal, will be the changes in the price, and if that price at the time that it is in force is granted equally to all buyers, that is, without discriminating among buyers, at that moment of time, or in that period,
18051 however brief or long, in which that price is posted, that is not discrimination.

18056 Q. Now, what about other manufacturing concerns who deliver to the town door,—the Fuller Brush man, if you will,—he goes from town to town, quoting the same price to each housewife; when the goods are shipped from the factory is that or is that not an example of delivered prices, in your opinion?

A. Yes, I would think that was a delivered price when the price is at your door, sold at your door, and not offered anywhere else. It would seem to me a delivered price.

Q. And you would agree that when these goods are shipped from the factory it nets more on nearby
18057 sales than on those to more distant points, would you not?

A. Yes, and I would like to give this further explanation.

Q. Go ahead.

A. That I would say, in general, that I am not in favor of or advocating or seeing any particular advantage in any limitation of the liberty of the individual seller, provided

he is not following some system that implied cooperation with some other seller in the same industry.

18058 Q. In your study of economic conditions you recognize, do you not, that it is common to sell a great many kinds of goods at uniform prices east of the Rockies, irrespective of the distance from the factory?

A. Yes, I know that from general information, what is called the postage stamp rate.

Q. And in all such cases would you or would you not say that a greater net will be realized by the producer on the sales nearer the factory?

A. Yes; that would be so, unless there was a postage stamp—unless they were sent within a zone parcel post. Yes, I think so.

Q. I am not confining it to any postage stamp group. I do not know exactly what you mean, Doctor, but it is true, is it not, that a great many articles are sold in that way?

A. Yes. I think that applies to smaller articles of generally lighter weight in proportion to their value. Sometimes the delivery is indiscriminately anywhere in the United States, and sometimes it is a higher rate west of the Mississippi or things of that sort. Those, of course, are more or less zone variations of a flat delivered price.

Q. And this method, Doctor, is frequently a part of the nation-wide advertising campaign that offers the

18059 goods at one price over the whole country; isn't that true?

A. I think that is true; yes.

Q. Now, do you regard all these sales at a uniform price over the entire United States as being discriminatory?

A. Yes; in strict theory they involve discrimination, and yet it is true in practical business, as it is in the law, where, on the whole, economy is effected by that and everybody is satisfied with it, I think no social problem of any importance arises.

18060 Q. You have two mills located at the same place—

A. Yes.

Q. —and they have the same mill net, the same freight rate, would they or would they not have the same market area?

A. Yes; the market area would be defined.

Q. All right.

A. If they were independent mills, there might be competition within that area.

Q. There is nothing in my question that suggested that they were not independent mills, is there, Doctor?

A. Well, we know that—

Q. You are suspicious of them anyway.

A. No. We know there are some where they are
18061 independent, where there are two or more.

Q. Now, putting your suspicions aside, Doctor, wouldn't these two mills have to quote identical prices throughout this market area in order to secure any business?

A. No, to the extent that you have just emphasized, that there are other reasons than price reasons that might influence buyers and to that extent there might be some little difference.

However, of course, your own explanation implied that to make up for the price difference there was perhaps a difference in service for courtesy or something of that kind, so there might be a small range of variation. Practically I don't think it amounts to anything.

Q. So you disagree with the complaint in this case, to the effect that a buyer would not pay a penny more for one brand of cement than he would for another?

A. I disagree to the extent that I agreed with you that non-price factors would sometimes—sentimental reasons would sometimes offset slight differences of price. But I think that is one of those highly speculative exceptions.

Q. How far do you think that sentiment would carry in a man paying more for cement than he could purchase it from another competitor?

A. Very little, and that is the reason why I was surprised that you emphasized it a while ago.

18062 Q. Regardless of what I did a while ago, is it your answer to my question now that you think that these two mills could sell at different prices in the same territory?

A. No, I don't think it is.

Q. Now, if either mill reduced its base, wouldn't the other mill be compelled to make a similar reduction if it was to secure any business in this market area?

A. I think that is true, on the principle of tendency toward uniform price in a market.

18063 Q. What do you mean by that explanation "under the principle"? Wouldn't it be so under any conditions?

A. No.

18064 Q. Tell us the conditions under which it would not be so.

A. If the one mill—if one mill was sold out to capacity and had orders in advance, it might be able to maintain its price for a considerable period. If both mills are running under capacity, I think it is true that that adjustment would have to occur.

Q. Sooner or later.

A. Well, pretty promptly, very promptly.

Q. So, as I understand you, then, under these conditions that we have been discussing you would expect to find identical prices quoted at each point in that market area by the two mills?

A. Yes, and that would not involve any absorption of freight.

Q. And would or could not these prices be identical at each point at any one time under conditions of effective competition?

A. Yes, all operating with the same base price and the same freight rates. Of course, there would be opportunities, however, if they sell at the mill for differences of transportation costs, by truck or waterway or barge, so that the delivered prices might vary considerably from the regular freight schedule.

18065 Q. So you think, then, that these two mills similarly situated could continue to sell, both stay in business, selling at different prices in the same area?

A. I only suggested the possibility of slight differences there, not permanently. It would be like the tendency to uniform price in a market.

Q. Regardless of how much jockeying there was, Doctor, there would come a time, would there not, when those prices would be the same?

18066 A. Well, at various times doubtless they would be the same.

Q. And you would expect that to be the normal situation under such conditions as we have been discussing?

A. Yes, and there may be there again differences in business connections and things of that sort that might permit of some variation.

Q. Would you say that throughout the area the delivered price to the customer would be exactly the same as it would be if he went to either mill and bought there and

transported it by rail at his own expense to his place of business, or to the place where it was to be used on the job?

A. Yes, if they are selling on the one-price system, which I thought was assumed there.

Q. And, as I understand you, then, in discussing this subject you do not object to identical prices when there is no so-called freight absorption?

A. When—no, I would not want to put it that way. I would say when those identical prices—I object to them when those identical prices are the result of following a basing point formula—

Q. Yes.

A. —by mills located at different points.

Q. I have not suggested that in any of this series of questions, Doctor.

A. No, but I am suggesting that.

18067 I am suggesting a situation where that does not obtain. I am asking you, then, do you approve of that situation, whether or not you have any objection to identical prices when there is no so-called freight absorption?

A. That is playing with the word "identical" delivered prices, which has come to be so inseparably connected with the basing-point practice, that if I answer "yes" regarding that, I seem to be making an admission—

Q. No, I do not think—

A. —clearly—

Q. No, I do not intend for you to make any admission. You can use any term you want, but keep in mind the two mills that I have been discussing and that you have given me the answers to, that have the same base or the same mill net, same freight rates, and are selling,—if you want to use any other term besides "identical"—they are selling at the same prices throughout the territory and at the same destination costs.

A. Well, if you have two or more mills at one location, and these mills are independent, as assumed in the question, really acting independently, you would have there what may be called intra-market competition; that is, they are all located at the same place, and at the moment when things are loaded on cars there is no freight element; f.o.b. is the same to all of them.

18068 Q. Do you object to identical prices in such a situation where there is no so-called freight absorption?

A. No, I don't object to prices uniform in a true competitive market, and that is what has been described here.

Q. And I think you have said, Doctor, that in such a situation as I have described you would expect to find identical prices.

A. Uniform prices.

Q. Uniform. Would you rather call them uniform prices?

A. Uniform, because we are now talking of a market price.

Q. All right.

Q. Now, will you assume again—here are X and Y, that we were discussing this morning (illustrating).

Assume, as we did, that you have two mills with the same base, X over here (indicating), and Y over here (indicating), $1.50, and there is a 10-cent freight rate between each of these intermediate points,—I think we found this morning that each mill would be selling at point E at $2. Do you recall that?

18069 A. That was assumed—

Q. That was a hypothetical question.

A. That was assuming that the whole freight was a dollar.

Q. That is right.

You have referred to this point, have you not, at which the two mills compete as constituting the marginal area?

A. Yes. I called it the geographical margin.

Q. Yes.

A. I don't think that is a term original at all with me.

Q. Now, Dr. Fetter, when you have such a marginal area of competition between the two market areas, would you not always expect the mills quoting there to quote the same prices at any one point?

A. That is what the marginal area, or margin of difference, means; it means the point at which they are. But if either mill changes its base price without the other mill changing, there is a shift of the point at which this margin of indifference falls.

Q. Then, to answer my question directly, you would so expect to find, Doctor?

A. I would expect to find—why, it is—I take it the equivalent expression, the margin of geographical difference is the point at which the delivered prices for the two mills exactly balance, or exactly equal.

18070 Q. And that is your way of saying that you would expect to find them selling at the same prices at the same time at that marginal point?

A. Yes, because by that definition that is what the marginal line is.

18073 Q. E this marginal place where they meet, happened to be an important sales territory.

A. Yes.

Q. Would you or would you not expect changes to be promptly met by X or Y?

A. Not at all certain. It would depend upon the volume of business to be secured; that is, the desirability of retaining sales at that point relative to the sales that are within the controlled area.

Q. Well, if that center E was New York or Chicago, there would be a considerable market there, would there not?

A. There would be, the larger the consuming capacity of this location near the boundary line the harder they would be inclined to fight for it.

Q. Now, with that situation again, I want to ask you the same question; whether or not you would expect changes to be promptly met by the other mill?

A. Usually, or frequently, but not always. Might be too costly to them in lowering their price to their nearby customers.

18075 Q. As an economic student, do you feel that price cutting at a particular point, as distinguished from general reduction throughout the area, would only be effective if it were secret?

A. Effective?

18077 Q. I mean by "effective," Doctor, one who accomplishes the results, being effective in this instance, taking the business, getting the order.

Trial Examiner Norwood: Yes.

A. Oh, I think it might get the order whether it was secret or not. I do think, though, that one matter on which there is the most unanimous agreement regarding this matter of discrimination is that secret discrimination is a bad thing,—it is a bad thing for the industry to engage in it, and a bad thing for the community as a whole. Whatever prices there are should be public, open.

By Mr. Leisure:

Q. And in this case that I have been discussing, with the

large and important market area at E, which I think we have agreed that the prices there would tend to be the same, uniform is your word,—the only way that such uniformity could be avoided would be by secret price cutting in that area, isn't that clear?

A. That would be the way preferred, doubtless, by the seller, because it would relieve him so fully from the pressure of other discontented customers. If it is not
18078 secret, then there is a howl goes up.

Now, I know enough about practical business to know that. If it is secret, why, they may get away with it for a good while.

18080 Q. Now, if each mill were limited to sales in its own natural territory, as we discussed this morning, you believe, do you not, they would still come into competition at the point where these natural territories meet, and this margin E that we have described (indicating)?

A. The mills will come into competition, yes, they do.

Q. And it would be only in this narrow margin between the two territories that competition would be found, if there were only one seller in each territory as we discussed this morning?

A. Yes, if there were only two mills in the country, or in the world.

Q. Well, regardless of whether there were only two, if we follow your statement that each one would be limited to certain territory, that is where the competition would exist, that is where they would meet at the marginal—

18081 A. Well, but if there were other mills anywhere—

Q. —they would meet in marginal territory also.

A. They would meet in marginal territory with these mills, too, in all directions, these mills would have—

Q. At these marginal places?

A. The mill is not to be thought of as competing on marginal territory with only one other mill.

18083 Q. Now, Doctor, suppose there is no demand at the marginal place, can you then have any marginal competition?

A. Well, that seems to be a mere truism—could not—could not have competition at any point where there was nothing to sell and no desire to buy.

Q. So if at these marginal places, instead of it being a place of great demand, such as Chicago and New York, as

l described, it was a place of little or no importance, then you would have no competition of any kind between the two producers, and each would be a monopolist in his own territory?

A. A limited monopolist, yes, a monopolist limited by certain marginal competition.

Q. Now, from your study in the field of economics, do you believe that in any market area you are apt to have local peaks of demand?

A. Yes, oh, yes, yes, undoubtedly every time a house is built, every time a bridge or a bit of highway is constructed, there is a marginal demand for certain building materials.

18085 Q. And if it were a larger order, such as one of the large dams, you would not expect it to have sufficient capacity to meet this peak of demand, would you, Doctor?

A. No, I—probably not in a good many cases, yes.

Q. Now, if it did not have sufficient capacity to meet these peaks of demand, would not the excess demand have to pay a higher price to secure the cement from a distant mill?

A. Yes, or the distant mill would have to reduce its base price.

18086 Washington, D. C.,
March 24, 1939.

18089 Dr. Frank A. Fetter thereupon resumed the stand and testified further as follows:

18093 *Cross-Examination (Continued)*

18094 By Mr. Leisure:

Q. Now, in describing a similar situation to Mr. Wooden, when you were questioned—

Mr. Leisure: And the question appears on page 17713, Mr. Wooden.

Mr. Wooden: Yes.

18095 Q. (Resumed) —where he asked you:

"Do you know, Dr. Fetter, of any economic writer who has taken the position that it is the tendency of prices to be identical at destination under competitive conditions?"

And you answered: "I do not."

18099 Q. Do you feel that the word "identical" cannot be used with respect to prices, unless you connect
18100 it up with your theory of basing-point method of marketing?

A. I think that the term "uniform," as applied to the basing-point practice, has so regularly been used in connection with a uniform market price, in and at a place which would correspond to a uniform mill price, or uniform f.o.b. price, and, consequently, you cannot use the term "uniform" to apply to an entirely different situation, as applied to delivered prices, without confusion.

Q. Then, my suggestion to you is correct, that when you use "identical" you insist on tying it up with your definition of basing-point method of marketing?

A. Yes, and I think that has been the usage throughout this case.

18102 Trial Examiner Norwood: You understand "identical" to imply a greater degree of exactness than the word "uniform"?

The Witness: Yes, as applied to delivered prices.

Trial Examiner Norwood: Well, as applied to anything?

The Witness: Oh, no. In ordinary usage if you are using it at a place, you might use synonyms. There are many examples of that in language where, for some, perhaps two words would be very adequate synonyms and yet in other contexts it might make a very absurd statement.

18103 By Mr. Leisure:

Q. Now assume that the two cement mills have been located at X and Y and that the only big market demand for cement is at city A; and let us as-
18104 sume that the freight from X mill to A is, say, 50 cents, and from Y to A is 70 cents.

Would you agree that X is in a more favorable position to name the price at A, under those circumstances?

A. Yes; assuming, of course, that it is favorably located for efficient operation.

Q. Yes.

A. We assume equal favorable conditions of technical production?

Q. That is right. Now, if X made a price of, say, $2.00 at A, you would have no objection to Y selling at A

at the same price if it sold elsewhere for the same mill net, would you?

A. No.

Q. So X would then, under those circumstances, net $1.50?

A. $2.00 at A?

Q. Yes.

A. Yes.

Q. And Y would net $1.30?

A. Yes.

Q. Now assume that you have another large city, B, which I have indicated for on the map.

A. Yes.

Q. With a demand for cement equal or somewhat similar to demand at A and with B located in the op-
18105 posite direction and with freight at 50 cents from Y and 70 cents from X, as we have already assumed, would you agree that Y would naturally be in a more favorable position to name the price at B?

A. Yes.

Q. Since Y's net on sales to the first town, A, was $1.30, if you add 50 cents freight to the second town, B, then the price there would be $1.80, wouldn't it, to have the same mill net which you would insist upon?

A. Yes. You are assuming that the price at Y was necessarily the same—determined by the delivery price at A. In other words, you are assuming that its base price has become $1.30, have you not?

Q. That would be necessary according to your theory if you were going to have uniform mill net?

A. Yes; at A.

Q. That was the only thing I was trying to develop, there.

Then you believe, economically speaking, Y would sell at B so as to net $1.30, do you not?

A. That would depend upon the pricing practice. It would, if it were selling at uniform f.o.b. without discrimination and it would not then—

Q. I am speaking—I mean economically speaking, it should sell—there is no use arguing about that, is there; it should sell at B at $1.80?

A. Yes, if its base price, $1.30, it should sell at B
18106 at $1.80.

Q. In that case if X also sold at B for $1.80 it would net, then, $1.10, would it not?

A. No. As I understand it—
Q. 70 cents freight.
A. 70 cents freight and at B—
Q. Yes.
A. Yes.

18110 Q. If mill X did reduce its mill net to $1.10, making the price at A $1.60, Y, in order to sell in city A, could only net 90 cents, isn't that true?

A. Yes.

Q. If Y sold in A it would then have to reduce its price at city B to $1.40; 90 plus 50 cents for freight?

A. Yes, if it wants to sell at both places.

If A is so important to it that it wishes to annex, there, it will have to reduce its base price, provided it is not discriminating.

Q. Of course I could stay out of city A if it chose to do so?

A. Surely.

Q. But I suggested those were large, important markets.

A. Yes.

Q. In other words, if X and Y both desired to sell in both city A and B and if each mill has a policy of selling only on uniform mill nets, according to your theory you would have a situation where each mill would have to keep reducing its net?

A. Oh, no—yes, on the absurd supposition no
18111 matter how low the price it would insist on selling at that particular point.

18117 Q. Now, as an economist, Doctor, you would expect, would you not, under the situation that we have been describing, that X would probably drive Y out of A?

A. Yes, I think on the—
Q. And that Y would probably drive X out of B?
A. Yes, I think there would be a division of territory.

18119 Q. Now, if tomorrow you found that all the cement mills in this country had adopted your theory, a policy of selling their cement each in its own natural market area only, and had ceased to meet competitive prices beyond this area by what had been called freight absorption, would you regard this as an evidence of collusion or agreement?

A. No; I would not think that would be, itself,
18120 conclusive evidence.

18122 Q. Now, as against the answer that you have made today in response to that question, have you previously said, "It is just a fairly typical example of the numerous class of enterprises which honestly find themselves in some such situation and wallow in a welter of local discrimination, powerless by separate action to get out, even if they would"? Have you previously made that statement?

A. I think that is a quotation from my extemporaneous remarks from the Monopoly Committee a couple of weeks ago.

Q. No, you are mistaken, Doctor; it is from
18123 your book. It is page 326.

A. Oh, well—well, then, that shows that I have not contradicted myself.

18125 Q. Could you give us any idea at all of the number of industries that follow this practice of absorbing freight?

A. That would be a highly factual matter. That would require an expert, I think, in marketing right up to date.

Q. But you would at least go this far, would you not, that the basing-point practice would be found in most, if not all, of the thousands or more industries organized in open-price areas is a probability, as far as the number of basing-point industries?

A. Yes, but that statement, of course, does not mean that products of all those trade associations, or necessarily that every trade association sells even part of its products, but this practice, I think—again I am speaking not from firsthand factual knowledge, but I think as a matter of general agreement that the practice of freight absorption has extended very rapidly in the last 20 years.

Q. Now, will you accept my statement that that is a correct statement of your own writing, on page 242 of your book, Doctor: "That the basing-point practice would be found in most, if not all, of the thousand or more industries organized in open price areas is a probability"?

A. That is page what?

Q. Page 242.

A. That, of course, is a remark—yes, you might
18126 say, a speculative statement.

Q. You have not yet answered my question. Did you make that statement?

A. I made that statement, yes.

18131 Q. Taking up another subject, Doctor, would you assign a natural market area to a foreign cement mill just as you do for American mills?

A. Yes, subject to our tariff legislation which is a part of the price situation.

Q. Would you consider New York City, for instance, to be a part of this natural market area for, say,

18132 Belgium cement mills if their mill price plus freight was less than the Lehigh or Hudson price plus freight to New York City?

A. I don't, of course, wish to answer in the form of an argument on the tariff, for either side.

Q. No.

A. So that what I say doesn't mean that I believe we should or should not have trade, but if—I would see no reason to make an exception there—then if the protective tariff policy wished to exclude the cement at any port they would raise the rate high enough to do so. It is 24 cents a barrel, now, I believe.

Mr. Leisure: Will you read the last question, please?

(Last question read.)

Trial Examiner Norwood: Will you give a direct answer?

A. I would say "yes" and then, that that involved no expression regarding tariff policy.

By Mr. Leisure:

Q. And under such conditions would you believe in restricting the American mills from competing in the New York area with the Belgium cement?

A. Yes, and if it was not good public policy, Congress would have to deal with it.

Q. And the same would be true, I take it, of other

18133 Atlantic ports; Boston, Philadelphia, Baltimore, and so forth?

A. Yes, I think that to leave the power in the hands of private industry of practically legislating on the tariff is not good policy.

Q. Then you can see no way, Doctor, in which the American mills could compete, in good faith, by meeting the lower price of foreign cement unless they also sold at all other points for the same mill nets?

A. No; I do not, and I think it would be a very healthy influence to control domestic monopoly to have that mar-

ginal competition there subject, of course, alwa's to correction and protection by Congressional legislation.

Q. Now, if it should occur, if the mill net from the sales thus made in these ports to meet the price of this foreign cement were so low that the companies would lose money, if all other sales at other points were made on the same basis then you agree that, obviously, the American mills would have to abandon all their sales in these Atlantic ports, do you not, Doctor?

A. Yes, and if they did that when they already have a protective rate of 24 cents a barrel it would mean that all of the citizens and consumers in that area would be buying cement at a lower price and the welfare of the consumer is, of course, a part of the general public welfare and a very important part.

18143 Q. You mentioned in your direct examination the subject of identity of the prices being evidence of collusion. If you found all American mills quoting the same price in New York or any town along the seaboard as the importers quoted it, would you regard this uniformity of price as direct evidence of collusion also of American manufacturers, as you testified on direct, collusion either among themselves or with the Belgian producers?

A. I think it would raise a very grave suspicion, as that identity would necessarily involve discrimination among their own customers.

18152 Q. Have you not previously testified as follows in response to this question:

"It is my feeling that the farmer takes the price which he can get. He ships his product to a central market, and then he hopes that circumstances will be such as to enable him to get a price that will make it possible for him to recoup the cost of production; whereas, if he wants to buy a Ford car or radio, or steel for his barn, or whatever he may want in the way of industrial products, he goes to the town and he pays the price that is fixed. He is in an utterly different category, isn't that true?"

And did you not reply to that question:

"That is true, but I wouldn't make the difference consist of a charter of incorporation. I would make it consist in the difference in the number of sellers, and in the existence, therefore, of competition."

A. That sounds like my statement.

Q. That is your answer?

A. I think that was made at the Monopoly investigation.

18153 Q. I mean, instead of fewness as to agricultural production, I mean compared to the multitude of sellers in the agricultural products.

A. That is a very great difference.

Q. Fewness of industrial sellers.

A. Yes.

Q. As compared to the multitude of sellers in agricultural products.

A. Yes.

Q. That is a fundamental difference, and it is an important difference?

A. It is an important difference, and, I may say, with reference to this quotation that you have given, that, as I recall it, the real—that statement was made in my comment upon a suggestion that the difference depended upon whether or not the sellers were incorporated; that is what I felt to be an excessive emphasis upon the mere legal form.

18154 Q. Now, you say "yes."

Have you not testified, and following on that subject:

"Q. There is a second characteristic of those automobile prices that is an outward aspect somewhat like the basing-point system; that is, that the prices are published in advance and are maintained for considerable periods of time, unchanged, ordinarily, from one model year to the next, so that the mere fact that prices are published does not constitute the basic criteria that there is or is not monopoly in the present system."

And did you not reply:

"No, I would say not."

A. I think that is correct. It is not of itself a conclusive thing. In the case of a highly fabricated product, the adjustments occur in various ways. We know that—everyone knows from his own personal experience in his own neighborhood—that as the season comes to an end

18155 that posted price is not the real price.

Q. So, in view of—

A. (Resumed) And you can buy a Packard model, a perfectly new car, toward the end of the season, at very considerably less than the posted price. So that if the posted price is actually inflexible it would have some sig-

nificance, and if the posted price is really a nominal price, being shaded in all directions, it would have another significance.

Q. So in the example you gave, it changes every ten months or eleven months.

A. The posted price does, the nominal price does.

18156 Q. When we adjourned, Dr. Fetter, I was reading one of your statements. I do not recall whether I read this or not, but I will read it to you now, on the question of uniformity of price:

"I would think that you might have a uniformity of price such as you note for the different brands if they are of equal quality, whether it was a monopoly or a competition I do not think that that would tell the story."

You agree, do you not, that uniformity of price is no evidence of either monopoly or competition, according to this statement?

A. Yes, I think that it is a general economic opinion that mere uniformity—that thing alone might be consistent either with a real competitive or a monopolistic situation.

18159 Q. Will you name those manufacturing industries wherein the individual seller secures a uniform mill net on all the sales today, under your theory?

A. To go into detail on that I think takes us right over the question we discussed this morning.

All mills that sell f.o.b., all industries that sell f.o.b. mill—

Q. Without generalizing, couldn't you give us the industries, Doctor?

A. No, I wouldn't undertake to do that. That
18160 practice has been changing very rapidly the last 20 years and that is really a factual matter for a specialist in marketing.

18167 Q. When you told Mr. Wooden in answer to one of his questions that the fact that the basing-point prices remained unchanged from January, 1933, to June, 1938, that indicated to you there was a lack of normal competitive forces at work since prices remained unchanged in spite of changes in demand for cement for public works, highways, and so forth. Did you mean that you would have expected prices to rise as demand increased?

A. Yes; flexibility of price means that prices in some

localities rise and at the same time, perhaps, prices
18168 in other localities fall; whereas, of course, in any great catastrophic change like business depression, they are probably moving in much the same direction everywhere but not necessarily at all at the same rates or to the same degree.

Q. Did you mean that the failure of cement prices to rise in the face of increased demand indicated the lack of what you call "normal competitive forces"?

A. Yes, I think that would be a sign. You can't consider price changes merely in one direction about flexibility; fiexibility is a matter of movement in both directions.

18176 Q. Mr. Wooden discussed with you Commission's Exhibit 1112, and ask you your views as to the statement appearing on it to the effect that the base price be made of various items of cost plus reasonable profits on investment, and that the base price plus the transportation charges would constitute the deliv-
18177 ered price in every market if there were no competition, and you answered "On the face of it the statement admits that it is a monopolistic price because it is a price made if they had no competition."

When you say that such delivered price in the absence of competition represented monopolistic price, did you intend to infer that the delivered price was unreasonably high?

A. Yes, I think that results from the fact that the cement companies are all in business while not realizing this thing which they say is their cost.

You must remember I am always suspicious of a cost estimate that is made by any producer for himself, for his own purposes, and they say that that represents their cost and would be their price, in the absence of competition, and yet the net realized prices of every mill or at least of a large number of the mills in considerably less than this figure which they say is the actual cost.

Then we have got the phenomenon of mills all selling very considerably below their cost estimate.

Q. Did you call it a monopolistic price because the statement assumed an absence of competition? I mean, isn't that what you say?

A. Yes. It was on that phrase, particularly, that I was depending.

18178 Q. And if the exhibit demonstrates that it is a cost plus reasonable profit, would you consider the price monopolistic only because the statement assumed the existence of one seller in that market?

A. The statement assumes that, you say? You mean that is included in the phrase "if there were no competition"?

Q. Yes. If the statement itself says that "This would constitute the delivered price, if we had no competition."

A. Yes.

Q. Therefore meaning if we were the single seller.

Will you just look at it, there, above the letter "R" in the middle of the page?

A. "OR"?

Q. Above "OR", yes. It is the third line in that paragraph "If we had no competition."

A. Yes.

Q. Does that imply to your mind that they did have competition or did not have competition?

A. It means that they have no competition in the sale at their base price which is their net realized price and the customer, no matter from what mill he buys, has to pay exactly the same price as if he bought from the mill that had no competition. There is competition, again recalling a few minutes ago there is wasteful competition, there is price-raising competition, but there is not price-
18179 lowering competition to the customer.

Q. Doctor, aren't you construing that sentence as if the word "if" read "since." You have often heard the importance of that little word "if," have you not?

A. Yes.

Q. Aren't you construing that as if the sentence read "since"?

A. I don't so understand, no.

Q. Suppose you read it out loud there, Doctor, so we will follow your answer.

A. "This base price plus transportation charges would constitute the delivered price in every market if we had no competition."

Q. "If we had no competition"?

A. Yes.

Q. I would like to have you read it.

A. "If we had no competition," yes. Now—

Q. That is a hypothesis, then?

A. They are using the expression "every market" there.

Q. That is a hypothesis, is it not, Doctor, if you will excuse me for interrupting you,—that is the hypothesis which they state?

A. Yes.

Q. Now, will you go on with that point, with that hypothesis, not construing in some other words?

18180 A. Well—

Q. Not using the word "since" in the place of "if."

A. Well, this base price is the price that they would get if they had no competition.

Q. Precisely.

A. And they get that price from their nearby customers, they do not get that price from other customers in territory where they are dumping, consequently they are discriminating and their total net realized is below what they consider to be just their costs.

Q. Doctor, they haven't stated there what you have just said—in fact, they have stated your theory in language when they say: "If we had no competition the base price plus transportation charges would constitute the delivered price in every market, if we had no competition," —isn't that what it says? Isn't that the hypothesis?

A. Yes, they are referring to the delivered price there; that is, its delivered price, and they are considering each destination place to be a separate market.

Q. Yes.

A. And they are assuming as—

Q. They had a uniform mill net just as you would have it on every sale; is that true?

A. No.

Q. You do not so construe that?

18181 A. Well—

Q. Where do you find anything in that language that is contrary to that?

A. If they had no competition that would be anywhere on the geographical margin, that would be the only mill in the country.

Q. Quite right.

A. If there is another mill in the country, single other mill, there is some point at which with this uniform base price they would meet geographical margin competition.

Q. Then it would be monopolistic to the extent that your theory is monopolistic, if you have one plant in one given area, with a uniform mill net, of course?

A. It would be, if there were no competition anywhere.

Q. All right.

A. On the margin, or anywhere else.

Q. Doctor, we discussed yesterday at some length the question of overhead in connection with the cement industry.

Let me ask you one question on that: Did you make any mention of the importance of heavy overhead costs in your book "The Masquerade of Monopoly" on basing points?

A. I don't recall whether I specifically mentioned that. I question whether I discussed that (witness takes up book for reference).

Q. It is not mentioned in your book at all, is it,
18182 Dr. Fetter?

A. Well, so far as I recall, it is not.

18183 Q. When you answered Mr. Wooden's questions, and particularly the long hypothetical question, and after that question,—let me ask you whether or not your definition as to price that "the amount received by the seller after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the seller" is
18184 correct. Is that your definition of price?

I do not want to mislead you, Dr. Fetter. I am not purporting to be quoting from your writings. I am asking you if that is your definition of "price."

18185 Q. I would like to find out if you do not accept that definition, what you do understand is the definition of "price," Doctor. You have got certain language which you use in your testimony, and we must have some understanding, you and I, as to what you mean when you use that word.

Now, if you do not accept that definition, will you give us another, or tell us what is wrong with that definition?

A. I think the definition, that the price of a commodity is the amount given by the buyer and received by the seller for that commodity.

18186 Q. "The amount received by the seller after deducting actual freight or cost of other transportation, if any, allowed, or defrayed by the seller."

A. I don't see any difficulty, off-hand, but I do reserve

my right to say that examination of any definition is one of the most painstaking tasks that anyone has.

Q. Well, at the moment you would have no special quarrel with that?

A. No; I would let it go.

Q. I am glad you haven't because that comes from a statute in Congress where eminent people also attempted to describe that.

Trial Examiner Norwood: What statute is that?

Mr. Leisure: It was the bill that was submitted to Congress, H.R. 8442.

I shouldn't call it a statute, it was a bill for the
18187 statute; 8442, 74th Congress. Congress rejected
the bill.

Q. The long hypothetical question, Dr. Fetter, when Mr. Wooden read it to you, and you know the one I mean, without my re-reading it, don't you?

A. I think so. I haven't it here.

Q. I have got it here if you would like to look at it.

Did you give any consideration to the production figures of individual mills and the manner in which the production figures vary from year to year, when you gave your answers to that question?

A. I cannot say, specifically, whether I did or not.

I compared this description, hypothetical picture, with the picture that I had in mind as being a normal type of competition.

Q. And did you also consider that in your opinions that you gave in other places as to Mr. Wooden's questions?

A. I suppose so. As the background of my
18188 thoughts. Economists cannot give a specific opin-
ion about anything without having a great deal of background in it. There is no opinion that would be worth anything that is suspended in midair.

It is always the result of your whole range of thought.

Q. Did you consider, in replying to that question, the consumption figures in the various large consuming areas in the country and the manner in which places of demand for cement shifted from time to time?

A. No, not all those specific conditions of the actual work, no.

Q. Did you consider in answering the long hypothetical question the location of basing-point mills and non-basing-point mills with reference to large consuming areas?

A. No, I was comparing a hypothetical question with a schematic picture of the competitive situation; neither one of them was realistic.

18189 Q. I think I asked you about the location of base-point mills, Doctor. In giving your opinions, in the course of your testimony, did you give consideration to any facts relating to changes in fluctuations of delivered price of cement in various consuming areas?

I do not remember whether I asked you that or not, Doctor.

A. I think not. That is continuing the series. No, my answer is the same, I was comparing one abstract type that was presented in the hypothetical question with the abstract type of a competitive market which I had in mind.

Q. Or did you give any consideration to any facts relating to varying seasonal demands for cement?

A. No; because the hypothetical question was not framed with reference to cement. It was an industry, was it not? Does it not say assume that there is general practice?

(Witness refers to typewritten copy of the long hypothetical question.)

Oh, it does say cement industry, it is an assumption of what was happening in the cement industry.

I gave attention to those factors that are there assumed.

Q. And, as to that, and your other testimony,

18190 did you give consideration to any facts relating to the capacity of mills, and the ratio of capacity and production over a period of time, and the relationship between places of demand and the location of the mills?

A. No, every time that such a thing as capacity was mentioned or inadvertently came in to my reply, I think my statements were challenged on the ground that I was not a factual witness.

Q. Did you give any consideration to any facts relating to overhead and fixed charges of various mills?

A. We—no, and views on overhead were discussed yesterday at some considerable length, but not in—not specifically considered in relation to that hypothetical question.

Q. Yes.

Well, now, Doctor, did you give any consideration to any facts relating to location of mills with reference to sources of raw materials?

A. That, and all these other things, are involved in

every competitive situation. The competitive situation means the choice of means to accomplish—to provide something to sell to the public, and all those things; therefore, are implied in that, and so, I think, with about all of these things that you are specifying in detail.

Q. Then you, did, or did not give consideration to those facts.

18191 A. Just as they are necessarily, I said, involved in the background of one's training and thought, but not—I was not—I am not of the opinion now that those things are peculiar to the cement industry, in the sense that they are things which have to be reckoned with in the cement industry and do not have to be reckoned with in other industries.

Q. Regardless of whether they do or not, in your opinion, Doctor, did you give any consideration to them?

A. Just as they are involved necessarily in any comparison there, such as I was—

Q. Does that mean that you did or did not give any consideration to them?

A. I did not in the specific way of considering the exact figures of capacity or anything of that sort, but I could not give—express an opinion either of basing-point method of sale or competitive method of sale without having in mind the general conditions which are necessary in the production and sale of commodities.

Q. Then, with respect to this specific question, what facts did you rely on as to location of mills with reference to the sources of raw materials?

A. I did not consider that. Every enterprise has to have a suitable source of materials and a suitable location.

Q. But you did not consider that, so we do not have to discuss it, Doctor.

18192 A. No—what was your last question?

Q. You did not consider it, so we do not have to discuss it.

A. I did not consider specifically the conditions in the cement industry.

Q. Well, regardless of whether you considered it specifically or not, did you consider it?

A. Yes, I considered it in this background of understanding of what is the nature of market and competition.

Q. And, Doctor, will you tell us what facts you relied on with respect to that?

A. Not particularly for cement at all, no.

Q. What facts did you rely upon with respect to cement?

A. I was not allowed to mention any specific things, as the source—as a witness—of fact. I was told that I was answering as an economic theorist.

Q. Now, you have told us that in considering these things you did rely on some of these—and you correct me if I am wrong—as I understand you, over this series of questions and answers since the recess, you told us that you did rely on certain background in reference to this question that I am now asking you, namely, location of mills in reference to sources of the raw materials. I am now asking you what facts you relied upon.

A. That would seem to be asking me to relate here all of the general information that I had—not as a
18193 factual witness at all, but I happen to know about the cement industry. I was not comparing the cement industry in all of its practical details with any other industry.

Q. But if you used it, Doctor, we would like to know what you used.

A. I did not use the specific facts regarding these matters that you are speaking of.

18195 Q. Now, in giving your opinions in the course of your testimony, did you give consideration to any facts relating to technological improvements adopted by various mills?

A. No.

Q. Did you give any consideration to any facts relating to operating costs and variations in costs as related to the varying volume of production?

A. No, but we discussed that yesterday in connection with the doctrine of costs.

18196 Q. Did you give consideration to any facts relating to average distances of delivery of cement from various mills to consuming areas?

A. No, that would have been very specific and concrete, factual matter.

Q. In giving your opinions in the course of your testimony on direct, did you give consideration to any facts relating to the extent of cross-hauling in the industry, and the conditions existing in the areas where cross-hauling takes place?

A. No, because I did not consider the extent of cross-

hauling, as actually measured, something that nobody knows at all exactly, is essential to a judgment regarding pricing policy.

Q. Did you give any consideration to any facts relating to the number of mills seeking business in the various consuming areas of the country?

A. No.

Q. Did you give any consideration to any facts relating to the ratio of profit to fixed investment?

A. No, and if I did I would be exceedingly suspicious of this item called fixed investment, which is largely a capitalization item which is lost in mystery in most cases.

18200 Mr. Wooden: All right, Doctor, you are excused temporarily.

I would like to call, just for a few questions, Dr. Clark.

(Witness excused.)

18201 Mr. Zimmerman: Dr. Clark is going to be here next week.

May we go off the record?

Trial Examiner Norwood: Yes.

(There was a discussion off the record.)

Trial Examiner Norwood: Back on the record.

Mr. Leisure: I object to the method being indulged in. Counsel knows Dr. Clark has been one of our advisors and under the rules of the Commission it is proper to give proper notice, and I object to it at this time. I think it is an unfair practice.

Trial Examiner Norwood: I don't think it is improper practice to not give notice to the other side.

Mr. Brick: The witness is entitled to reasonable notice, is he not?

Trial Examiner Norwood: For what purpose?

Mr. Brick: To consult with his Counsel.

Trial Examiner Norwood: Do you think it is good practice for a witness to consult with Counsel on the

18202 other side when he is going to be a witness for one side?

Mr. Leisure: He has been working with us on this case, as Counsel knows, and he told us he had an out-of-town witness to put on. I think it has all the evidence of a trick and I object to it.

Trial Examiner Norwood: Bring the witness on.

Mr. Zimmerman: As long as I won't ask him any questions nobody—this if off the record.

Trial Examiner Norwood: I think it had better be on the record.

Mr. Zimmerman: Either way you want.

My thought was Dr. Clark will be here just as much next week as this week and there is no necessity of insisting upon going on now.

Trial Examiner Norwood: A very good reason has appeared here, now, to examine him.

Mr. Withrow: Why?

Trial Examiner Norwood: Before he can consult with Counsel on the other side.

Mr. Zimmerman: We haven't any prescience or mind-reading ability.

18210 Washington, D. C.,
March 28, 1939.

18214 DR. FRANK A. FETTER thereupon resumed the stand and testified further as follows:

*Cross-Examination by Mr. Zimmerman (Continued).*

18215 Q. No, it is not. In answering the several hypothetical questions propounded to you by Mr. Wooden did you rely and base your answers, to some extent, upon your general knowledge, the trend of legal legislation and opinion as, for instance, set forth in your book, "The Masquerade of Monopoly"?

A. Yes, I think so.

Q. Now, referring to your testimony with reference to your examination of the Supreme Court record in the 1925 cement case: You testified, I believe, that—and correct me if I am wrong on any of these statements—that you had read that Supreme Court record.

You also referred to having read some publishe'
18216 literature of the cement industry.

Now, in answering Mr. Wooden's hypothetical questions, did you take into consideration and include in your answers, to any extent, the knowledge you gained from that reading?

A. I think it would not be true to say that I took into consideration, that would mean that I had deliberately weighed those points; but I think it is impossible for one

to forget everything he knows, of his general experience and information. That is always a background for one's judgment, and judgments would be worthless unless one had such a background. That is what we mean by an impractical man, a man who does not—

A. Well, I think that in the essence,—a man who knows nothing of the world and passes judgment on a difficult and complex question.

18217 By Mr. Zimmerman:

Q. Well, would you say that your answers, then, were based partly upon you general knowledge of the subject, including what you had read in the Supreme Court case, and in the literature of the cement industry?

A. Yes, in the sense of my further, former explanation.

18220 Q. The extent to which you made answers beyond what I have read here was what you had read of the Supreme Court case and what you have read of literature in the industry, and perhaps what you had read in connection with Trade Commission reports, and the like, was it?

A. I think as to the background of my knowledge I would not limit it.

Q. Well, it included all of those things in all of them?

A. All of those things.

Q. All of those things were included in your answer?

A. Doubtless, and a good many others.

Q. Those were all included in your answers?

A. I think so.

Mr. Zimmerman: Now, if the Examiner please, I renew my motion to strike out the three questions, and to strike out all of the Doctor's testimony in answer to those questions, inasmuch as it now appears, as it did appear once before off the record, at least as to the first question, and then I offered to show by the statement that the Doctor made that his testimony and answers had been made based upon matter that was beyond and outside the scope of the assumed facts, contained in the

18221 questions.

Trial Examiner Norwood: The motion is denied.

18224 Q. Considering that this present marketing system in cement is very much like the present marketing system in quite a number of other commodities that

are sold in competition with cement. That is to say, one may be substituted for the other. Would you not think it would be essential in this reorganization of our plan to, simultaneously with doing away with the present marketing methods in cement, to do away with those same marketing methods in all other commodities with which cement competes?

A. Yes. The general method of selling cement, apart from specific differences in the industries, is the basing point method and, essentially, the same as that in a number of other industries, and if it is wrong in cement it is wrong in other industries.

18225 Q. I take it you certainly do not consider, as an economist, that it is helpful and constructive to business recovery or business advance to satisfy ourselves with bitter condemnation of business practices which have long been in existence without first making a complete factual study with a view to improvement and change, gradually, without upsetting or destroying general goodwill of business and businessmen? You would agree with that, wouldn't you?

A. No, because that seems to me to be a proposal to adjourn to the Ides of March any practical reform.

Q. Is it not essential to give due consideration to the effect on labor, capital invested—by that I mean general human assets—not only as to original producers, but as to all those who are brought into the related picture which includes fabrication, distribution and transportation, and the ultimate users. We have to study all those things together, don't we?

A. No, because that is the commonest method of drawing a red herring across the trail.

18227 Q. Why should those located at more distant points from point of production, when such points under our present system of transportation are necessarily located close to the natural location of raw materials, be penalized by having to pay a higher price than those that are located close to production?

A. I am astonished at that statement because that is exactly what happens at every non-basing point mill. They are located because of the advantage of the location for materials and cheapness of production and yet, under the system of non-basing point mills, phantom freight is paid

by all of the people nearest to the source of production.

18229 Q. Have you any opinion, one way or another, Dr. Fetter, as to whether or not persons who live more distance from a point of production than others should be penalized by having to pay a higher destination cost for the product?

18230 A. No—yes, I have an opinion.

Q. Do you think they should be penalized by having to pay a higher destination cost?

A. I think they should not be penalized, and I do not consider that paying freight from the point of production is a penalty.

Q. Well, it is an addition to their cost, anyway, is it not?

A. The word "penalty"—

Q. Well, just answer my question. I am not asking you for a definition of the word "penalty."

I say, it is an addition to their cost, is it not?

A. It is.

Q. Right.

Trial Examiner Norwood: Just a moment.

Have you considered in reaching this conclusion,—do you consider that a penalty?

The Witness: I do not. That is the normal difference of place value.

By Mr. Zimmerman:

Q. In other words, adding the utility of transportation?

A. Yes.

Q. I see.

A. If you want to use that phrase.

Q. Have you considered in reaching this conclusion that all people are not nomads who can fold their tents and establish their homes close to sources of supply wherever they think they need something from that source?

18231 A. Yes.

Q. Well, is it not the establishment of definite fixed home sites that has helped to build up our present national economy?

A. Yes, that is a very broad and rhetorical statement.

Q. Yes.

Do you consider it economically unsound to spread the

distribution of commodities, and the cost thereof, so that the burden of distance is spread over the cost to all users?

A. Will you please just read that.

Mr. Zimmerman: Read the question.

(Last question read.)

A. Yes, I consider it unsound; it is a communism with reference to freight.

18232 Q. Now, economists and commentators on economics are naturally going to use the term "free competition" according to the ends that they seek to attain,—that is correct, is it not?

A. No, it does not seem to me that that would be legitimate, to change your definition of—for practical purposes, real—

Q. Do they all agree upon a definition of what is free competition?

18233 A. I would not expect them all to agree, any more—

Q. Do they?

A. —any more than I expect doctors all to agree.

Q. Well, do they agree,—not what you expect, but what is the fact?

A. Well, they do not agree. If you are using the term "economist" to mean every sort of business adviser, as it it is now being used.

18235 Q. Oh, well, in your testimony describing a theory of confining mills, such as cement mills, to a territory where they have an advantage of geographical location freightwise, over other mills. What industry, if you can think of one now, operates successfully on that basis?

A. Every industry, and every enterprise that sells at a uniform f.o.b. mill price.

Q. Like, for example, the automobile industry?

A. Yes, if you are dealing with absolutely homogeneous products.

Q. Well, are you familiar with the automobile industry enough to say whether it would apply to it or not?

A. No, it will not, because the product is not homogeneous.

18236 Q. Well, now, can you name one single industry, just one is all I am asking for, to begin with, that

does operate upon the theory which you have expounded and which I have asked you about?

A. When I have mentioned the whole class of mills, of industries, that sell f.o.b. mill—

Q. You ought to be able to pick out one, oughtn't you?

A. It includes all mills.

Q. Yes, I know.

A. All industries.

Q. But can't you pick out one from this vast number you referred to?

A. All mills that do not sell on the basing point.

Q. Can you pick out one single one and name it?

A. Yes.

Q. Please do, sir.

A. The milling industry.

Q. What kind of mill?

A. Well, the—

Q. The flour mill?

A. The flour mill is all local business.

Q. Oh, you mean the old grist mill?

A. Yes, and there are still thousands of them.

Q. You would not call a grist mill an industry, would you?

A. I would call a milling industry—

18237 A. —I would call a milling industry an industry, and a grist mill an enterprise.

By Mr. Zimmerman:

Q. Now, would you say that the flour mill industry in this country successfully operates upon your theory of all mills being limited to selling in a territory in which they have a freight advantage over others?

A. I have had that assurance from a man in the milling business, in Minneapolis.

Q. But an economist does not base his opinions and statements under oath on hearsay, does he, Dr. Fetter?

A. Well, I usually believe what an industry tells me. I don't consider that I must treat them as intentionally misrepresenting.

Q. Do you believe what the cement men tell you?

A. Yes, when it is in accord with what I have learned from other sources.

Q. That is when you have checked up on it a little bit?

A. Yes, I—

Q. Well, now, you never really checked up on this thing that your acquaintance in the flour mill industry told you about, did you?

A. I was a little skeptical, but I never—

18238 Q. You never checked up on that?

A. —but I never found any reason to object; he told me this—

Q. I am not asking you what he told you. I am just asking you if you ever checked up on it?

A. I tried to, but I did not have enough sources of information.

Q. You can object afterwards, if you do not mind.

Can you give us any single example of any industry that operates upon the basis of being confined to selling in the territory only wherein the producers have a freight advantage over others, where you have made a factual investigation to the extent that would enable you to say, under oath, that the industry does so operate successfully?

A. No, and you are insisting that I appear here as a factual witness regarding other industries than cement.

18239 Q. Yes. Then we may say that your opinions, as you have expressed them here, you would prefer to have kept within the realm of theory; is that right?

A. Essentially that.

Q. Well, now, Doctor, you have not made a factual study, then, even of the cement industry, have you?

18240 A. Yes and no. If I may say yes, that would seem to commit me to becoming a witness of the fact; if I say no, it would indicate that I have a mind completely blank regarding that very interesting and important industry.

By Mr. Zimmerman:

Q. Well, which are you going to say? Are you going to say "yes" or are you going to say "no, or are you going to say "Injun"—"don't know"?

A. I am not going to say either "yes" or "no" positively.

Q. Now, then, suppose you tell me whether you

18241 have made a factual study of the cement industry or not, or that you don't know whether you have or not?

Please give me some kind of a direct answer to that question.

A. No, I have not made a factual study of the cement

industry in the sense in which a student would use that term.

Q. You have done a little piece-meal investigation, have you not?

A. No, not investigation.

Q. No, not even that?

A. I have informed myself from a variety of sources.

18244 Q. If I may advert, for a moment, to your quotation from Adam Smith.

I wonder if you would repeat that for me; the one you used on direct. If you remember it; if not, perhaps I can refresh your recollection.

A. "People of the same trade rarely meet together even for merriment and diversion but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." I think that is the quotation.

Q. Yes. That is pretty good.

All right. Did you intend, thereby, to assume that that quotation, which implied venality and short-sightedness, destructive selfishness, and which was written more than 150 years ago relating to conditions in England, would apply to businessmen of the present day, in general?

A. Yes; I am sorry to say that I think—

Q. That is your viewpoint?

A. (Continuing)—it would substantially apply.

18249 Q. When you were answering Mr. Wooden's questions did you take into consideration the right of buyers to dictate the place at which they will buy a commodity?

A. No, because I am not sure that at the present time they have this right; at least, they cannot exercise it.

Q. Did you give any consideration as to whether or not buyers of cement, generally, for more than 30 years last past have generally demanded that they be sold delivered cement priced at the point of their use or their destination?

A. I believe that to be a misstatement.

Q. You do?

A. Yes.

18250 Q. Do you agree with this statement: The price of a commodity finds meaning only as it is related to a specific time and place for the transfer of title of the commodity?

A. Yes, I think that is true.

Q. Now a moment ago you said that you thought it was a misstatement that buyers generally—that is to say, a considerable percentage of them—particularly those who are buying in considerable quantities for resale or for fabrication, have, in the cement industry, demande that they be given prices of delivered cement at their point of use and destination.

If the evidence in this case should prove that that were true, would that have changed or altered in any manner your answers to Mr. Wooden's questions?

A. On that violent assumption, I think it might. I would have to weigh that.

My attention was called, many years ago, to very strong protests by the New Jersey Highway Commission against identical delivered prices and I can take economic notice as the Court takes judicial notice, of the fact that protests of this sort have frequently occurred; of public purchasing agencies and highway commissions.

Q. How does that touch the question as to whether or not buyers have generally, for more than 30 years last past, demanded that they be given price quotations
18251 of delivered cement at their point of use?

A. Well, it would indicate that they have not so demanded. They have demanded, rather, the opposite. They have demanded or desired and expressed the desire for a mill base price.

Q. You didn't say that that was done in the New Jersey case, did you?

A. Why, I said that the Highway Commission protested.

Q. Because the prices were identical at the destination?

A. No, they wished, as I recall it, they wished to have a mill base price.

Q. Can you turn to any document or record anywhere at all that so states with reference to the New Jersey incident that you speak of as having occurred some years ago?

A. No, I shall not attempt to act as a factual witness in this matter.

Q. Do you recall any such thing? Do you recall, definitely, any such record.

A. This thing I just spoke of?

Q. Any such record of the New Jersey Road Commissioners' demanding an f.o.b. mill price?

A. I recall the incident.

Q. Do you recall them demanding an f.o.b. mill price?

A. I recall reading about it, yes.

Q. They did ask for an f.o.b. mill price?

A. That was my understanding.

18252 Q. But you couldn't point to the source of that recollection, in any way, could you?

A. No, I can't at the moment.

18254 Q. If the evidence in this case should show that such buyers of cement as government and states and contractors have, for a great many years, requested prices for delivered cement at destinations or points of use, would you consider them, as an economist, that such a price method should be prevented, in any manner?

A. No. If that were the general fact, general situation, if that were truly the case as regards the government and as regards the contractors, I would say that they are not the ultimate consumers. They are purchasers of material—

Q. For fabrication?

A. (Continuing)—for fabrication—

Q. That is right.

A. (Continuing)—and it is not an uncommon thing in business for the middleman, the fabricator, to be quite content with a fairly high price regardless of the fact that the public is bearing the burden and he is passing it on, provided he can be sure that there is no competition on that point, that matter, by his immediate competitors on the same plane of competition.

Q. Would that be true also of dealers that buy the

18255 products for resale?

A. I think so. Oh, yes; I think so.

Q. And where Government and States have, as they have in the last few years, put themselves in the shoes of contractors, would it not, perhaps, be true of them, also?

A. Well, I would doubt that. The position of the Government is entirely different from that of a middleman who is making a profit out of the transaction. The Government is acting as the agent of the public and has great concern or should have great concern with the ultimate burden upon the public, the taxpayers and others.

18258 Q. Now, have you any idea at all as to the percentage of cement, all that is sold, as to how much of it is sold by the producers to and through dealers scattered all over the country?

A. No, I seem, however, to have seen a statement that during these recent depressions, with the pump-priming process, under full swing, that about half of all the purchases of cement are by public funds.

Now, that again I don't vouch for as an absolute fact.

Q. I see.

Have you ever made any factual study to determine, or have you any knowledge of the subject, as to what extent advantages of cost of a product, such as cement, that have been obtained by contractors, or dealers, during a period of extreme low prices received by the producers of the community, have been passed on to the small consumer, even in the reduction of retail price or in reduction of the fabricated articles made from a commodity like cement?

18259 A. No.

Q. Well, you certainly do agree with this, do you
18263 not, Dr. Fetter, that all bad functioning as applied to marketing methods generally, and including the commodity of cement, are not matters related to monopoly?

A. Yes, I agree, that is a very general statement.

Q. Do you agree, further, that all bad functioning, in such an industry as cement, is not a matter of deliberate choice of the producers, but may, to a considerable extent, be due to the behavior of buyers and dealers?

A. Yes.

Q. Or possibly to natural development?

You agree with that, do you not?

A. That might be—

18264 Could you say, without making other related factual studies, that the mere fact that the price of a commodity has in any particular area remained stationary for a period of a considerable time proves that the public interest has been adversely affected thereby?

A. Well, yes, if it can be fairly inferred that that is the result of monopolistic practices.

Q. Without that you could not infer it, could you?—

A. No.

Q. —that the public interest had been adversely affected?

A. The statement is very broad and vague, and I would say no, that you could not without that.

Q. Would you agree with this, Doctor:

"Reasoning in every phase of economic study calls for building of counteracting forces or pulls, and it is the net balance of all these forces operated simultaneously
18265 that cannot be isolated therefrom, that is of real significance when it evaluates actual economic life?

A. That sounds like a good general statement, yes.

Q. Do you agree with this:

"That the justification of every human institution must be found exclusively in its social utility"?

A. Yes, I think that is general accepted current political philosophy.

Q. Now, outside of the Trade Commission economists, and that, of course, includes you, Dr. Fetter,—can you enumerate any other social group that is now, or has been in the last five years, in a position of making a specific complaint with reference to dissatisfaction, or injury, resulting from the sale of commodities generally at delivered prices?

A. Yes, I think we have heard many and vociferous protests from public agencies, both State and federal, including Cabinet officers.

Q. I see; but not contractors, for example, or dealers?

A. The record, I suppose, will show that.

Q. Well, you do not know of any of your own knowledge, do you?

18266 A. No.

Q. Yes, but I am asking you now whether or not your approach here on these questions has not largely to do here with the small buyers, or what we call the consumers.

A. No, I don't mean merely the small buyers. I mean the average citizen who is interested as a taxpayer,
18267 and interested in taxes and public improvements, and also interested as a user of cement.

Q. You use some cement, do you?

A. I used some cement last week.

Q. Yes.

A. Despite the high price.

Q. How?

A. Despite the high price.

Q. How much did you—

A. I suppose it was a bag full, maybe.

Q. Did you buy it?
A. No, I did not.
Q. What was the price?
A. I am paying for it.
Q. What was the price?
A. I don't know.
Q. Why did you refer to it as "despite the high price" if you do not know what you paid for it?
A. Well—
Q. Just why did you throw that in?
A. Well, because I think the price, under present conditions, is high.
Q. You are just a little bit allergic to cement, generally, in other words, and cement prices,—isn't that about the fact?
18268 A. Well, perhaps that's a true statement, yes.
Q. Yes, but you have not an idea what you paid, or what you will have to pay for that sack of cement, have you?
A. No, it was bought by a mason.
Q. And you do not know anything about what brand it was, either, do you?
A. No, I do not.
Q. Or where it came from?
A. No.
Q. Calling your attention to record page 17710, where you made the statement to Mr. Wooden:

"I have examined at one time or another the writings of a very large number of economists on that subject, and it is the general consensus that in a typical market, at a definite local place, without inclusion of freight, that the rule holds that there is a tendency towards uniformity of price in that market."

And may I say that Mr. Wooden stated that he preferred to assume that the writers examined represented a pretty fair cross-section of economic opinion on that subject.

You recall that statement of yours, do you, Dr. Fetter?
A. I think so: I seem to.
18269 Q. Well, do you know of any economic writer—name one if you can—that has taken the position that it is the tendency of prices to be identical only with the specific inclusion in his definition of your words "without inclusion of freight"?
A. Do I know, no.

Q. Know of any writer that has ever expressed such an opinion in that way?

A. No.

18270 Q. Now, bringing it up to date, can you find any one of them that ever made a statement such as you made including in it "without inclusion of freight"?

A. No, they haven't used that phrase.

18277 Q. Now let us refer to the actual list of prices and shopping around and behavior; let us put it that 18278 way; in the marketing of Portland cement.

Let us suppose a case, Dr. Fetter, where a State such as the State of Indiana, some years ago—it may have been 1932 or 1933; it doesn't matter—sent out invitations for bids upon quite a large quantity of Portland cement to be used at various destinations and they asked for, in their invitation, prices of delivered cement quoted as of those several destinations and they got, I am told, and we will suppose they did, prices quoted for delivered cement at these destinations which were identical and they threw out the bids and they may have done that, and I think it is fair to suppose that they did it twice, and then a cement manufacturer over in Illinois came in and, as you would put it, cut the price and then the Road Commissioner or the State Highway authorities of this State notified all of the various cement producers in the State of Indiana about this new price, this new low or cut price that had been received and invited them to meet that price. Understand, I say "meet it." I mean, make identical prices. We won't quibble about that. It means identical prices.

Let us assume that that was done and that, thereupon, the mill over in Illinois which had filed the lower price got no business and no award of any contract whatever, but the business was all given to the mills that had met by identical quotations the price.

18279 Now would that be some indication to you the manner in which buyers treat sellers in relation to competition which results in identical prices at a destination?

A. Well, to say, the least, I think that the Commission was not following the usual method of awarding the contract to the lowest bidder.

18280 "Q. Do you think, Dr. Fetter, that you have sufficient knowledge of the manner in which contracts are customarily awarded by road commissions to determine

whether or not the award in the Indiana case that I cited to you was made in accordance with their usual method?"

A. Well, I have my impression. It seems to me that the usual method is to advertise for bids to let to the lowest bidder, and if the conditions were those assumed in
18281 the question, it seems to me that they did not let to the lowest bidder.

By Mr. Zimmerman:

Q. Would you have any idea as to how often that occurred in the cement industry?

A. No, I would not.

Q. Would you think there would be anything in that picture which would encourage producers to try, in the future, to avoid, by making their prices lower for delivered cement, identical at destination?

A. I do not.

I would say that it was a very short-sighted policy on the part of the highway commission. I hesitate—I am a native Hoosier—I don't like to criticize officials of my own State, but that does not look very good to me on the assumed question there.

Suppose, Dr. Fetter, that the invitations called for nothing except f.o.b. mill bids, and there were some bids f.o.b. mill of $2 and some of $1.75, some of $1.50, and, oh, many others somewhere in between those figures, but all quite variable.

In such a situation as that, how would it be deter-
18282 mined as to who was the lowest bidder?

A. That would be determined by a combination of the mill bid and the freight to whatever destination was desired.

Q. So that the award would not be made to the lowest price, but the award, in your opinion, should be made to the lowest destination cost, in that case?

18283 A. On the assumption of the question, the award would be made to the lowest destination price.

By Mr. Zimmerman:

Q. Is that, in your opinion, the way it should be made?

A. It would depend on whether that f.o.b. mill was that I would call a genuine f.o.b. mill.

Q. I am sorry; I didn't get that.

A. It would depend on whether that f.o.b. mill bid was what I would call a genuine one; that is, representing the price at which the mill at that time was selling generally,

or whether it was a mere calculated f.o.b. which might start with a delivered price formula and figure back to
18284 what is really only a counterfeit mill price.

Q. Well, suppose we were working entirely on an f.o.b. mill basis, would you think that it should not be permitted for a mill to take into consideration the cost of transportation to the destination in making its bid, and adjusting its mill price accordingly?

A. Yes, I think that it is not well for mills to discriminate against its regular customers and give lower terms to the customers of their competitors.

Q. I do not think you have answered my question, because my question contained nothing from which you could infer that there was any discrimination whatsoever.

Suppose you read the question.

Trial Examiner Norwood: Read the question, please.

Mr. Zimmerman: And see if that is the best answer you feel you can make to it.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. That seems to me clearly to mean adjusting the mill price on that particular sale. It does not mean changing its general mill base, and, consequently, we have there a question in which we are assuming that the mill is selling at a uniform mill base, and at the same time it is not selling at a uniform mill base.

By Mr. Zimmerman:

18285 Q. I did not say to you anything about whether it was selling on a uniform mill base.

A. Have to supply a little logic to the question.

Q. No, you are supplying things that are not in the question.

A. No, I am not.

Trial Examiner Norwood: I think he is answering the question.

Mr. Zimmerman: Well, now, let me get you straight, if I can.

Q. Do you think that it should not be permitted for a mill to attempt to get business from such an institution as a road commission of a State, that was asking for bids on a large highway project, to adjust its mill price, assuming now that we are referring only to f.o.b. mill pricing, so as to take into consideration the manner in which awards would be made,—by that I mean, take into consideration the cost of freight to the destination, or destinations.

18286 A. No, as a matter of long-time public policy, it is my personal opinion that it would be better not to do that.

Q. Now, if it were not permitted, then the mill that was closest freightwise to the destination, or destinations, if there was but a single mill that was closest freightwise, it would always be able to quote the lowest price; is that not so?

A. By no means so.

Q. All right.

A. The mill that was farther away might have lower cost of production, might have more efficient management, and a number of other things.

Q. I see.

A. It might enable it because—although farther away—to sell as low or lower than the other mill on a mill base.

18287 Now, do you think that, economically, it is proper for a mill, if we were working on an f.o.b. mill basis, entirely to change its f.o.b. mill price from time to time in order to get business?

A. That is exactly what it ought to do, I should say. That, as we discussed that thing at some length in Mr. Leisure's illustration of the X and Y mills and the A and B locations, and he demonstrated there, very neatly, and very effectively that there would be a very effective competition there; that each mill would be induced by the desire to attach marginal territory and that there might be and would be very effective competition.

Q. Well, it might change its price for a particular job and then change it again within five minutes after that quotation was made and that would be perfectly proper, wouldn't it?

A. No, I think not.

Q. Let us say—

A. If that practice became at all common it would undoubtedly be a proper subject for further legislation.

Q. Now how long, in your opinion, should such an f.o.b. mill price remain stationery without being subject to change at will of the seller?

A. That is a subject for Congress, primarily, and for the administrative bodies that deal with it.

18288 Q. No, I am only asking you now for your opinion as an economist.

A. That is going forward to cross a bridge long before we come to it.

Q. You said it could be proper, in your opinion, to change it in five minutes. How long a time do you think should elapse?

A. That is the usual method of cross-examination to make me say six minutes or seven minutes or eight minutes; that is not a practical question.

Q. Is it a practical answer to say it is not proper to change it within five minutes?

A. Yes, because that would be so evidently an attempt to make a special discriminatory price under the guise of a mill base change.

Q. Who would it be discriminating against?

A. Against other buyers within the same 10 minutes, we will say.

Q. Suppose there were no other buyers within the same 10 minutes?

A. If there were no other buyer within the same 10 minutes, and if there was no one injured by it, then, as a matter of fact, I wouldn't think it was discrimination. It would be discrimination if, under the circumstances, it was used as a means to discriminate.

18889 Q. And you couldn't tell whether it was discriminating or not unless you had all the facts surrounding the market conditions at the time?

A. In that particular narrow question you put, I couldn't. The courts and the lawyers live on just this sort of problem; practical decisions.

Q. Don't you think we could spare that in this record?

A. No, I think that is helpful.

Q. All right; as long as you think it is helpful, it is all right.

Trial Examiner Norwood: I think we could spare some of these questions and answers. Counsel is raising the legal question that comes up under the Robinson-Patman Act.

Mr. Zimmerman: There is a count on that in this case.

Trial Examiner Norwood: Yes, but you are asking this witness his opinion about it.

Go ahead.

By Mr. Zimmerman:

Q. Again, on this subject of what sellers do to buyers, let us assume a case where more than 600,000 barrels of

cement were needed by a government agency for a public work and there had been various bids submitted, and after
the bids were submitted the government agency went
18290 out and made a private bargain. In other words, shopped around and got a price to suit it and awarded that contract involving more than 600,000 barrels on the basis of that private contract. Would you not infer from that that buyers may and frequently do successfully dictate to sellers?

A. I don't see that that is dictating to sellers, no.

Q. Well, they left all the other bidders in the lurch and went out and made a private contract. They are free to do that at any time, even under the cement pricing system, are they not?

A. I don't know about that.

Q. You do not know?

A. No.

Q. Do you know of anything to the contrary?

A. It is contrary to what I have thought to be the general public practice and policy.

Q. And if you found that the evidence in this case indicated more than one, in fact several instances of that kind, would that, in any way, have changed the answers you made to Mr. Wooden in response to his hypothetical questions?

18291 A. No, several—that is three or four or five—cases of that sort in an industry that has possibly hundreds of thousands of contracts, would not seem to me to change the—

Q. Even though it ran into millions of barrels?

A. It would be an exception to the usual practice. Now, in human affairs that is always happening.

Q. But if you were to have instances of that sort which did run into millions of barrels, would it not indicate to you that there was some freedom to shop around in the industry in buying cement?

A. A very large buyer, like the State or Federal Government, of course is in a different position from the ordinary individual.

Q. Now, that is true.

A. The exception—

Q. Pardon me.

A. —that proves the rule, you might say.

Q. That is true also of large buyers among contractors, is it not?

A. I—
Q. I mean construction contractors on big public works.
A. I haven't known of any cases of that sort.
Q. Do you know that it is not true?
A. No.

Q. Well, now, what about dealers that are buying
18292 cement in carload lots, would you be surprised to learn that dealers often say to representatives of cement sellers,—that is, mills,—that they can get a lower price, and they use that as a lever to get a lower price from the concern whose cement they have been selling,—would that surprise you any?

A. No, that would not. I would be very ready to believe that, and I think that my opinion is not peculiar when I say that secret discrimination is something that really hardly any of us would approve.

Q. Would it be discrimination if the dealers did succeed in getting a lower price in such a case?

A. A secret lower price?

Q. I haven't said anything about secret in either my original question or this one. You added that.

A. Yes. Why, by definition it would be discrimination, if they are getting a lower price than the price that the same seller or producer is giving to its other customers.

Q. Well, now, does that have any relation to time, such as prices made in the same hour, or same day, or same week, or same month?

A. Yes, we have gone all over that. A discrimination literally means a difference of price at the same time when there is a current price for most—we will say for some—of the buyers which is not the same as the price charged to other buyers at the same time.

18293 Now, that time might be an instant, or a brief period; that is a thing we have gone over.

Q. Now, let us take the situation in the Illinois Highway bids that ran into as much as two millions of barrels in a single year. Would you say that if the evidence should show in this case that the State of Illinois went out and made private contracts for so much as that, that that again indicated freedom of action on the part of buyers, a very concrete example of it?

A. Yes, a certain kind of freedom of action. It does not necessarily mean that even as big a buyer as the State was allowed to go to a mill and meet there with all the other buyers.

Q. Well, your idea of a market is, then, just a place where, like a room, or an open space, somewhere, where all the buyers and all the sellers, or at least one buyer and a lot of sellers, get together and talk it over?

A. One seller and a lot of buyers?

Q. No, let us put it the other way,—a lot of buyers, or one buyer, and a lot of sellers, we will say.

A. Well, as we have said before, a real market where all the conditions are fulfilled would require both buyers and sellers to assemble in considerable numbers.

Q. Is it not a real market when a contractor, whether it be a State Government, or a national government,
18294 or a contractor, sends out invitations and asks for bids to be sent to a certain point at a certain time,—does not that constitute a real market in your opinion?

A. No, I think not.

Q. Well, in view of this Indiana example that I gave you, is it not true, Dr. Fetter, to paraphrase your own words which occur in your answer to Mr. Wooden at page 17716—

Mr. Zimmerman: I am sorry that Mr. MacIntyre is not here, apparently.

Q. (Resumed.) —that it is often utterly futile for any prospective seller to try and encourage shopping around by cutting prices. He might try it once, foolishly, but if his price is not identical at the destination with his competitor's it would appear to be utterly useless for him to attempt to avoid it, because if he cuts the price the favored competitors would promptly meet it and take the business, no matter how low they may go, the same thing will happen and he will get into ruinous price wars. Is that not so?

A. I don't recall that. Now, I would like to see the context on that.

Q. Does he not know that if every other mill goes him one better, or the buyer gets his cut, the buyer will merely use it as a lever to induce the buyers favored mill to meet the prices, and then the price cutter will get no business.

18294½ Is that not so?

A. No, I don't recall this question as coming from Mr. Wooden. Is it set out—

18295 Q. Well, it fits the Indiana situation that I cited to you, doesn't it?

A. I know, but you are citing it—
Q. I will come back and read that to you in a moment.
A. —as the question of Mr. Wooden.
Q. I will come back and read that to you in a moment, Dr. Fetter. I am asking you if that would not fit the Indiana case that I cited to you?
A. Is that Mr. Wooden's question?
Q. It is my question now.
A. I have lost the line. Could I have that read? I will have to have the question.
Trial Examiner Norwood: Read it.
Mr. Zimmerman: I believe it will be quicker to restate the question.
By Mr. Zimmerman:
Q. What I ask you is this now:—let us get Mr. Wooden's question at page 17716 so as to refresh your memory of that.
(Counsel hands record to witness.)
A. (Witness refers to record.) Page 17716?
Q. Yes, I refer to the one that begins at line 23—no, I guess it is line 22.
A. The very meaning of the words "identical delivered prices"?
Q. Yes.
18296 A. You say the question—
Q. Let us just read it:
"The very meaning of the word 'identical delivered prices' is such that when and if a system of basing-point prices is in operation it is utterly futile for any prospective buyer to shop around. He might try it once, foolishly, but if prices are identical at destinations it is utterly useless for him to inquire. He knows that he will get the same quotation from every mill.
"That is the very essence of the basing-point practice when and if it is in operation."
Now—
A. Yes, and I—
18297 Now, referring to the Indiana case that I cited to you, wouldn't you, in such a case, where it ended up by the prices being identical except for the one who had cut the price and was left out, would it not be fair to say that in such an instance it would be utterly futile for a prospective seller to try to encourage shopping around by cutting prices?

A. The question put by Mr. Wooden referred to the—

Q. We know that. We have read it.

A. (Continuing.) —futility of the buyer shopping around.

Q. I am just putting it the other way; talking about the futility of a prospective seller trying to encourage shopping around by cutting prices and asking you whether or not in a situation like the Indiana case I gave you, if it is not utterly futile for the prospective seller to do that?

A. Yes, I think it is and that was already implied in my former answer when I said it looked to me, on the basis of the hypothetical question, that the highway commission was very short-sighted; taking a very short-sighted view.

18300 May I remind you of your testimony at record
18301 17721 and in order to refresh your memory of it let me recall this question Mr. Wooden asked you, or so much of it as you find necessary. Stop me, if you wish.

The question was, "If it were claimed that when the basing-point system issued there is an independent market price at each destination determined separately, and that the local price at destination the seller discovers, if he can, by diligent inquiry at a multitude of destinations and then exactly matches those destination prices, what is your opinion of such a claim?"

You replied:

"If your claim were true and you should find a variety of independently determined prices of 50 or 100 destinations all over the country, whatever be the number—if these were separate markets where the forces of supply and demand were operating there were local influences, and the prices arrived at would have a certain independence. They could not, of course, diverge more than by the local freight between destinations, but as the local freight rate is very considerable for mileage, that would permit a very considerable variation in the local prices even of destinations a few miles apart, but that, of course, is utterly inconsistent with the conception of the bas-
18302 ing-point practice, because in that the identical delivered prices of 50 or 100 destinations all conform to a formula and, mathematically, if 50 or 100 prices all fit into a definite formula it, of course, is evident that they cannot be independently locally determined prices."

That is the end of the quote. If the evidence of this case

should show a variety of independently determined prices of 50 or 100 destinations all over the country, under the statement which you made in your answer would that indicate to you a certain independent force utterly inconsistent with your conception of the basing-point practice?

A. Yes, it would. I would consider that the destinations that conform to one formula would be those connected with one mill.

There might be destinations in far distant parts of the country where the identical delivered prices followed the formula of another mill, and so on, every destination in the United States, I would say, necessarily conforming to a formula of some mill.

Q. Do you recognize any distinction between what you call the basing-point system of marketing and a system which economists sometimes refer to as a mill base system of marketing?

A. Oh, yes.

18303 Q. Well, are you now quite certain, without any factual study of the cement industry, as to whether cement is marketed on a basing-point system, as you call it, such as is used in the steel and iron industry or was used under the Pittsburgh-Plus system or under the mill base system of price?

A. I feel quite certain that I understand the general lay out, yes.

Q. Yes. All right. Now what system is it that you are under the impression is used in the—

A. I think what is called the multiple basing-point system.

18304 Q. Like in steel?

A. Yes, that is what is in force in steel.

Q. Well, I am talking about the system of pricing, now known as the multiple basing-point system.

What I want to know is whether, in your opinion as an economist, the system in vogue in marketing cement is the same as the multiple basing-point system as used in steel?

A. Well, if you will allow me to make the broad distinction between—

Q. Well—

A. —what we call essential and petty special details, I would say they are the same.

Q. Well, now, what are the petty special details in which they differ, in your opinion?

A. Oh, the product is quite different.

Q. In what way?

A. Well, much greater variety of forms and styles, and qualities in the question of steel.

Q. Yes.

A. With a large variety of variations of prices as the result of extras, and many practical considerations of that sort.

Q. Any other things besides that that you can
18305 think of as petty details?

A. I think that covers it.

Q. Well, now, let us specialize a little bit:

Is it not a fact that one of the outstanding and essential elements of a basing-point system, as used in the steel and iron industry, is a limited number of fixed and published basing points for each commodity that they make and ship?

A. Yes, there is a limited number in cement also, so I see no difference there.

18306 Q. Just a moment. I do not want a long harangue on that, if you please. I am asking you now whether that is not one, merely one, of the outstanding and essential elements of the basing-point system, as used in the steel and iron industry, if there is a limited number of fixed,—predetermined, I mean,—and published basing points for the various commodities that they make and ship?

A. No, I think that's not the essential characteristic.

Q. Well, is it so that there are, those facts are true, of the system in steel?

A. You are asking me now as a factual witness again.

Q. Well, don't you know?

A. If you say there are I will say "yes."

Q. I don't say there are.

18307 A. I will say "yes."

Q. I am asking you.

A. But if you say there are, I will accept your statement.

Q. I don't say there are now. Now, Doctor, please.

Trial Examiner Norwood: Just answer, if you will, please, Doctor.

Mr. Zimmerman: That is right.

Trial Examiner Norwood: If you know, tell him, and if you do not know tell him you do not know.

The Witness: I have a fair idea of what the basing-point system is.

18308 Q. Do you know now whether those characteristics—

A. That is not the question.

Q. —are there?

Trial Examiner Norwood: Please.

Mr. Zimmerman: Please do not argue with me.

Trial Examiner Norwood: He has asked you another question.

Mr. Zimmerman: Read it, the one before the argument.

(Last question read as follows:

"Q. Do you know now whether those characteristics are there?")

By Mr. Zimmerman:

Q. The characteristics that I have recited, are they true of the multiple basing-point system, as in the steel and iron industry,—do you know?

A. I can't say that they are there, because there are many changes that have been under way in the past year, and I would think that the description in the question was a very loose one.

Q. Well, now, Doctor, let us eliminate the last year and say previous to the last year, was it characteristic of the multiple basing-point system in steel?

Mr. Wooden: Your Honor, I have been rather patient with this line of examination; but I think the whole

18309 line is objectionable, and I object particularly to this question as calling for conditions in another industry which are not involved in this case, and, therefore, I object.

Trial Examiner Norwood: Yes, I wish Counsel would tell me just how this is relevant.

Mr. Zimmerman: Well, if Your Honor please, this witness has said that he believes that it is his impression that the same method, the same multiple basing-point system is used in both of these industries. Now, I think I have a right to go into that question to determine whether or not that is correct, because it is very material to the opinions—

Trial Examiner Norwood: Did he bring that out in cross? Was that brought out in cross-examination?

Mr. Zimmerman: I do not know that it was brought out in cross-examination.

Trial Examiner Norwood: Or in direct?

Mr. Zimmerman: The witness did in his direct examination refer to it, and he did write a book on the subject in which he brought in and likened the cement industry to the thing that was done in steel, and even referred to the cease and desist order entered against steel.

The whole thing was gone into on his direct ex-
18310 amination.

Trial Examiner Norwood: But the book is not on trial here.

Mr. Zimmerman: No, I am not asking him what he said in his book at all, and I am not trying to try that book, that has already been done. What Your Honor asked me was if that had been gone into in the direct, and I say that it has.

Mr. Wooden: Well, I recall no questions of that sort. Whether some volunteered statement was made along that line—I doubt—but I don't remember.

Trial Examiner Norwood: Tell me just how the similarity of this cement industry to the steel industry is relevant and material here?

Mr. Zimmerman: It is relevant and material only because the witness has said that he meant industry was like it, and Your Honor knows very distinctly what the situation was on direct examination, and he went along and told how he had been interested in the method of pricing, and steel, and how cement was copied from that, and so forth and so on.

Trial Examiner Norwood: Even if he said much on that subject, how is it important here?

Mr. Zimmerman: Well, as to that, I do not think I am
called on to argue the importance or lack of im-
18311 portance of it.

Trial Examiner Norwood: You mean that you think that—

Mr. Zimmerman: If it is within the scope of the direct examination it is my privilege to go into it on cross-examination, and it was within the scope of the direct examination, and there is no sound basis for objection to it.

Mr. Wooden: I am quite sure that I never asked the witness on direct to compare the basing-point system in cement with the basing-point system in steel.

Mr. Zimmerman: If the witness volunteers statements —that has been one of the difficulties here—the witness

has not only volunteered but been encouraged to volunteer.

Trial Examiner Norwood: Counsel has his remedy here, to move to strike.

Mr. Zimmerman: We tried it and it didn't get anywhere.

Trial Examiner Norwood: The objection is sustained.

By Mr. Zimmerman:

Q. Do you believe, Dr. Fetter, that any economist can fairly and intelligently pass upon the economic advantages or disadvantages of any marketing system, or pricing system, without a very thorough knowledge and under-
18312 standing of the subject of cost?

A. Yes, I think so.

Mr. Zimmerman: If the Examiner please, in view of Your Honor's ruling upon my question, I move now to strike out of the record the questions and answers that I propounded to the Doctor with reference to the basing-point system in steel, and all matter in the record where the Doctor has testified relating to that subject.

If Your Honor feels that it is not a proper subject for me to go into, I will strike out the questions and answers.

Mr. Wooden: I take it that motion, then, includes any reference to it that have been brought into the cross-examination of the Doctor based upon his book "The Masquerade of Monopoly"?

18313 Mr. Zimmerman: It does not; it includes only my own questions.

Trial Examiner Norwood: I will ask a question.

Mr. Zimmerman: It includes only my own questions.

Trial Examiner Norwood: Well, I shall take the motion under consideration and will ask Counsel to cite me the pages and lines that he wishes stricken.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: And I will give it careful study.

Mr. Zimmerman: But, first, with reference to the questions presently asked, and answers, will you allow that?

Trial Examiner Norwood: What is that?

Mr. Zimmerman: I say, first, will you allow the motion first as to the questions and the answers which came up this afternoon, where Your Honor feels that is not a proper subject for me to go into?

Trial Examiner Norwood: Well, one reason I had for

sustaining that objection is that I thought you had gone into it enough, and I shall wait until I can see the record on that, and then I will rule on it.

Mr. Zimmerman: Well, if Your Honor takes that position, then I offer to develop from this witness—

Trial Examiner Norwood: Yes, that is it.

18314 Mr. Zimmerman: Then I offer to develop from this witness that there are many very material differences between the basing-point, multiple basing-point practice, in steel, and the marketing methods in the cement industry. I will attempt to, and offer to show, by this witness, that there are not any published or fixed basing-points in the cement business; that there is freedom to make new mill bases in the cement industry at will; that there are a large number of price leaders that establish and quote prices on mill bases of their own, running into pretty nearly 90 per cent of the entire number of the producers in the industry, as contrasted with a very limited number of so-called basing-points in steel; that in the cement industry there is not published from time to time, as there is in the steel industry, price lists which set forth the basing-points and the basing-point prices—an example of such price list I offer to exhibit; that in the cement industry there is freedom to act spontaneously to shade prices, to meet the welfare of any producer, and the market conditions at the time, and other facts which would indicate that the cement marketing method is not a basing-point system at all, and not a multiple basing-point system, and not essentially similar to or at all like the

18315 so-called basing-point system in steel and iron.

Mr. Paulson: How does Counsel expect to prove that with an economist on the stand?

Trial Examiner Norwood: I was just wondering; but the Counsel may show all those things which he proposes to show with regard to cement, but not—

Mr. Zimmerman: I am hoping to show the distinction between the two systems, and to interrogate this witness to develop those points which I think I have a right to do.

Trial Examiner Norwood: You may not try the steel industry here in order to show that it is different from the cement industry, or similar.

Mr. Zimmerman: Well, I want to make it clear for the record; and I also want to make it clear for the record that in view of Your Honor's ruling, I now move to strike

out of the record any and all references which the witness made in his direct examination which tend to compare or show that the pricing methods in the cement industry, or the marketing methods, are the same as, or similar to, those used in the steel industry.

Trial Examiner Norwood: Well, I shall consider that. If Counsel will give me the citations I will—

Mr. Zimmerman: In due course.

Trial Examiner Norwood: I am inclined to think
18316 that I shall allow it.

Mr. Zimmerman: Thank you, sir.

And Your Honor will understand that it is going to take me a little time to do that.

Trial Examiner Norwood: Yes.

Mr. Wooden: I should like to see those quotations, too. I think there are very few of them on direct.

Q. Dr. Fetter, do you believe that an economist can fairly and intelligently pass upon the economic advantages or disadvantages of any marketing system, or pricing system, without a very thorough knowledge and understanding of the subject of cost in that industry?

A. Yes, I think that is not essential, the basing-point system is a system of selling, and not of producing goods.

Trial Examiner Norwood: I think that identical question was asked before; it sounds strangely familiar.
18317 Mr. Zimmerman: It should, I asked it myself a while ago, and in the dim past this afternoon before we had this long argument.

Mr. Wooden: Just a few moments ago.

Mr. Zimmerman: That is where I got it from, I assure you.

Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. Now, Dr. Fetter, I didn't say anything about basing-point system, or any kind of a system, I merely referred to any marketing system. Perhaps you did not understand the question. Let us read it.

Trial Examiner Norwood: Yes, read the last question.

(Last question read by Reporter.)

A. The same answer as applied to any system of selling.

By Mr. Zimmerman:

Q. Well, what do you mean, please? Give me an answer.

A. I mean that it is not necessary to study costs in an industry throughly and specially for the purpose of studying the selling methods. The two things are not in the same field. One is in the field of manufacturing, the other is in the field of commerce.

Q. Well, when you say "selling system", you mean "marketing system"?

A. Yes, marketing system.

18318 Q. Yes.

Well, do you think that without such a knowledge and an application of it that due consideration could be accorded by an economist to the general welfare, which involves and includes not only the continued existence of the industry under examination; that is, producers in it, and investors in the industry, but also the livelihood of all the persons who are employed in the industry, and those who are directly and indirectly dependent thereon?

A. That is the desirable ideal of statesmanship, and it is something that an industry can never do for itself.

Q. I am speaking about it now not from the standpoint of a statesman, but from the standpoint of your own position, that of an economist.

A. The economist is a specialist, and will aid the statesman by analyzing certain aspects of the subject.

Q. All right.

Now, then, let us get an answer to the question.

Mr. immerman: Read the question.

Trial Examiner Norwood: Read the last question.

(Last question read.)

A. I think that a completely wise decision on anything requires divine wisdom, superhuman, and I don't know of any economist who has it.

By Mr. Zimmerman:

18319 Q. Didn't you understand the question, Doctor?

A. Yes, I am answering.

Q. Now, will you please give me an answer to the question, and not a sermon on divine questions?

Trial Examiner Norwood: Well, read the question and answer.

(Last question read by Reporter.)

Trial Examiner Norwood: Now read the answer.

(Last answer read by Reporter.)

Trial Examiner Norwood: I think the question and answer are on the same high plane.

Mr. Zimmerman: Regardless of fact, I would like to have an answer.

Trial Examiner Norwood: Take a five-minute recess.

(There was a short recess taken.)

18320 Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. I would like to get an answer to my last question. I will put it to you again in order to save time.

To refresh your recollection, Doctor, of the questions, you have, in your direct testimony, referred to the economic advantages and disadvantages of a marketing system or a price system. That is so, isn't it?

A. I think that topic came up, yes.

Q. Now I am asking you whether or not you believe that an economist can fairly do that thing without a thorough knowledge and understanding of accounting methods that may be applicable to such industry with reference to costs in such an industry and I am asking you—your answer to that, as I recall, in substance, was that you did not think it necessary. That is correct, is it?

A. I think so.

Q. All right. Now I am asking you whether or not without such knowledge do you think due consideration could be accorded by such an economist in his judgment on the advantages or disadvantages of such a marketing system to the general welfare, including within the term "general welfare" not only the continued existence of producers in the industry, the welfare of investors in the industry, but also the welfare and livelihood of all persons

19321 that are employed in the industry and those that are dependent directly or indirectly upon the industry.

A. Have I not answered that?

Q. All right; you have not answered that, no.

Trial Examiner Norwood: You might answer it further, if you can.

A. Yes, I think due consideration could be given without such prolonged and intensive study of the cost problem.

By Mr. Zimmerman:

Q. Now let us ask you about price for a moment.

Would you agree that price of a commodity include all the elements of cost, including all the utilities, using the term "utilities" in the economist's sense, that are added to it up to the time that a sale take place and title passes to a buyer?

A. No, it does not always do that. Sometimes it does.

Q. Would you agree with this; this is a quote:

"The entire cost of a good may be analyzed into its two parts by a successive consideration of the outlays of everyone who has had anything to do with producing or selling it, from the retailer or salesman back to its obscure origin."

A. I think that is an analysis of cost. That is not an analysis of price.

Q. Do you agree with this:

19322 "One or two types of cost apparently increase demand but are really costs of production.

"Transportation is an example since nothing could be sold if the goods were not conveyed to the market."

Do you agree with that?

A. Well, there are phrases there that I wouldn't want to use. They seem to me rather obscure.

I would have to study over them. I think I agree with what seems to be the meaning of it.

Q. Well, do you agree with this, that there is no such thing as price until actually a sale is made or, to put it this way, until actually a sale is made there is no price?

A. That is my view of it. I think that is the more exact usage.

The term "price", of course, is used much more loosely than that in the generic sense, but I think that is a proper imitation of the term.

Q. As to a buyer of such a product as Portland cement at any destination, take Washington, for example, he is buying cement packed in convenient containers delivered to Washington, D. C., and there pays a price for it as delivered cement; do you agree that every element that has gone into the cost of that product laid down at Washington must be included in the price of that delivered article?

A. Are you talking, there, of the ultimate con-

18323 sumer or of the dealer?

Mr. Zimmerman: Read the question, please. Let us see if there is anything enigmatic about it.

Trial Examiner Norwood: Read it.

(Question read.)

A. I would prefer to say—

By Mr. Zimmerman:

Q. I am not asking you what you prefer to say. I am asking you whether that is agreeable to you or not. You

can answer that "yes" or "no" and then we can get an explanation.

Trial Examiner Norwood: Answer it in your own way.

Mr. Zimmerman: If the Examiner please, I think I ought to be permitted reasonable latitude on cross-examination and I ought to be permitted to have a direct answer before there is an explanation, and I do not believe that the witness ought to be—

Trial Examiner Norwood: Don't interrupt the witness and then you can tell whether he is giving you a direct answer or not.

Let him answer and then you can tell whether it is direct or not.

Mr. Zimmerman: I can tell in an instant it is not a direct answer when he answers in any other way than "yes" or "no."

18324 Trial Examiner Norwood: Read the question.

(Question reread.)

Trial Examiner Norwood: Please make a direct answer to that, Doctor.

Mr. Wooden: Your Honor, let me, before the question is answered, object unless it be clearly understood that the Doctor is answering strictly from the legal—I mean from the economic standpoint.

He is not entitled to answer that question from the legal standpoint, but only from the economic standpoint.

Trial Examiner Norwood: He has been asked for the economic aspect of this thing.

Go ahead.

A. Yes; that is all a part of delivered price and we have discussed at great length that the meaning of delivered price, which means the price of the cement plus the price of the freight.

By Mr. Zimmerman:

Q. And not only transportation but every other element that goes into the cost of that product laid down in Washington, D. C., is a part of the price of the delivered commodity, is that not so?

A. The amount paid for the—

Q. Excuse me, Dr. Fetter, for interrupting you,

18325 but I asked you if that is not so; either say yes or no.

A. No, you can't say—

Q. Thank you. You have answered the question.

Trial Examiner Norwood: Well, answer it further.

Mr. Zimmerman: If the Examiner please, it is my privilege to have an answer and for the witness to stop and if there is any explanation to be made it can be made upon redirect.

Trial Examiner Norwood: I don't think Counsel's privilege extends as far as he seems to think it does. I can judge as to whether the question has been answered.

Mr. Zimmerman: It was answered.

Trial Examiner Norwood: (Addressing the witness) Do you wish to make any further answer?

The Witness: I do, Your Honor.

Mr. Zimmerman: I maintain it ought to be done on redirect examination and not on cross-examination. I object to it.

Trial Examiner Norwood: The objection is overruled.

A. The price received for an article very frequently does not cover all of the elements; very frequently more or less of these cost elements are not recovered in the price.

By Mr. Zimmerman:

Q. Is that all, now?

18326 A. That is all.

Mr. Zimmerman: I now move to strike the answer as not being in answer to my question at all but being purely a statement made at the suggestion of the Examiner.

Trial Examiner Norwood: Motion denied. You can't ask this witness a question and then shut his mouth before he has completed his answer.

Mr. Zimmerman: It is impossible to do it with this witness, sir, but it ought to be approached a little better than it is. There ought to be something left for redirect examination.

Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. Now the product is of no use to the buyer except at the time and at the place and in the form as he requires it at his destination, is it?

A. No.

Q. It is not for that reason that contracts are awarded on the basis of destination cost?

A. No, I think not.

Q. And is it not for that reason that invitations to bid provide in the form how cement shall be packed and delivered and where it is to be packed and delivered?

A. No, I think that is not the reason.

18327 Q. Is not transportation of commodities to the point of use an essential element in the cost of production of every manufactured, finished commodity just the same as it enters into the cost of every item of raw material that must be transported any distance whatsoever from the point of its production to the point of its use in the processes of fabrication?

A. Yes; the cost of transportation incurred before the completion of the process or up to the completion of the process of manufacture and before the article is offered for sale is, of course, a part of the cost incurred.

Trial Examiner Norwood: A part of the cost of production?

The Witness: Yes; up to the time it is ready to be offered for sale as a more elaborate commodity.

Mr. Wooden: That was not the question, however.

Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. Now, since transportation is an essential element of cost, in approaching any solution of an economic problem in relation to a marketing system that to any considerable extent is dependent upon transportation to deliver its product to a buyer, you must take into consideration all the aspects of transportation and transportation concerns that do the transporting, is that not so?

18328 A. I think so, yes.

Q. Here we are principally interested in a transportation system such as railroads and I think you would agree, would you not, as an economist, that railroads are, economically speaking, the circulatory system of our economic structure in America, is that not so?

A. Yes, they are the common carriers, the most important common carriers.

Q. And as far as place relations are concerned, transportation determines exchange, is that not so?

A. It is an agency of exchange.

Q. Well, it determines exchange, does it not?

A. That seems to say it is the sole causal explanation of exchange.

Q. It is the final thing which determines it because, for example, you yourself told us a while ago that even if commodities such as cement were sold on an f.o.b. mill

basis that the thing which would determine the exchange, that would determine the award of a contract, was the destination cost, which involved the cost of transportation. You recall that?

A. And the base price.

Q. But the thing that ultimately determines it does involve transportation costs, is that not so?

A. Transportation costs are a part—one of the elements.

18329 Q. Now transportation—do you agree with this —"Transportation, the measure of its efficiency, strikes from the economic forces the chains of time and place.

"We should cover most of what needs to be said in this connection in saying that transportation promotes competition if we gave a sufficiently wide construction to the word."

Do you agree with that?

A. Yes; I have given much consideration to that in connection with this geographical marginal competition.

Q. By the way, Doctor, while we are referring to that word "geographical".

You have told us that, in your opinion,—I think you did, at any rate—that there were some geographical maladjustment of locations of cement mills; is that correct?

A. Yes.

Q. I wish you would expound that to us a little; tell us wherein that is so, in your opinion.

A. Well, the basing-point industries have expounded that so fully as one of the main objections to any change in the basing-point practice.

They say that the present location of the mill and the capacity is such that if we changed to an f.o.b. mill that a large proportion of these mills would be found to be badly located.

18330 Trial Examiner Norwood: Do you know whether that condition is true or not?

The Witness: I believe that is true, to some extent, although it seems to me probable that in order to make the argument as effective as possible that it has been exaggerated.

That is just a matter—

By Mr. Zimmerman:

Q. Dr. Fetter, you have gotten off on a tangent, again.

Mr. Zimmerman: Will you read that question again?

The Reporter: "Q. By the way, Doctor, while we are referring to that word 'geographical'.

"You have told us that, in your opinion,—I think you did, at any rate,—that there were some geographical maladjustment of locations of cement mills; is that correct?

"A. Yes.

"Q. Q. I wish you would expound that to us a little; tell us wherein that is so, in your opinion."

By Mr. Zimmerman:

Q. Wherein are there geographical maladjustments or locations of cement mills, in your opinion?

A. Well, I wouldn't attempt to improve upon the statements made by the industries themselves.

Mr. Zimmerman: I move that be stricken from
18331 the record as not responsive to the question.

Trial Examiner Norwood: Motion allowed.

By Mr. Zimmerman:

Q. Now please answer the question.

Trial Examiner Norwood: Tell us what you know.

A. You mean just in the cement industry?

Trial Examiner Norwood: Yes.

A. Or in any basing-point industry?

By Mr. Zimmerman:

Q. Excuse me, Doctor, there is a question pending and I would like an answer to it before we have any discussion.

A. Please read the question.

Trial Examiner Norwood: Read the question.

The Reporter: "Q. Wherein are there geographical maladjustments or locations of cement mills, in your opinion?"

A. I think I ought not attempt to pass on a factual question in detail of that sort.

By Mr. Zimmerman:

Q. Didn't you know what you were talking about when you made that assertion?

A. Surely I did.

Q. Just what was it that you can tell us, now? What did you know about any geographical maladjustment as

to location of cement mills when you made that statement?

18332 Mr. Wooden: Your Honor, if the question calls for an opinion on theory, it is one thing. If it calls for a factual answer as to particular, concrete facts, it is another. The Doctor, as I understand, does not profess to be in possession of facts regarding a particular situation in particular localities. As I understood his general answer it was based on the whole question of theory and the probable result from an assumed state of facts.

18333 Trial Examiner Norwood: Well, he may give us any facts that he may have in his possession or he may state what are the bases of his prior statement.

Mr. Zimmerman: May I have the question read?

(Last question read.)

A. I know that it is the general economic opinion regarding the basing-point practice that it tends to locate mills somewhat differently from what they would be if we had a genuine competitive situation and in the steel industry—

Mr. Zimmerman: If the Trial Examiner please, now, we are going too far.

Trial Examiner Norwood: We have ruled out the information about the steel industry.

Mr. Zimmerman: I move that be stricken. Let us get the witness back into the cement industry.

A. My view about the effect of the cement industry is, of course, affected by my general conception of the basing-point practice in all industries where it is in vogue.

Br. Mr. Zimmerman:

Q. I hadn't asked you a thing about the basing-point practice.

You made a statement that, in your opinion, there was, in the cement industry, a maladjustment as to the geographic location of cement mills. That was your statement as you have said.

18334 Now, I want to ask you wherein is that maladjustment of location,—what do you know about it?

A. Well, I think it is undenied that the capacity of cement mills is about three times as great as the current demand, the current production, and that, of itself, indicates a mal-location.

There are, I think, 19 mills in the Lehigh district. That

is a district peculiarly favored by natural materials and with certain advantages, I have understood, in the quality of the material and in the facilities for production, but the 19 mills have, of course, an enormous capacity at one point, and I am strongly inclined to think that if they were not permitted to discriminate in price and to dump their products, that there would be some difficulty at that point.

Q. Now, what has that got to do with the geographical location, the maladjustment as to the geographic location of the cement mill? Which one of any of those mills would you say was geographically maladjusted, as to its geographic location?

A. I am inclined to think that 19 mills at one point where there is a very large element as there is would be a maladjustment so long as or unless they are able to continue the high base price which permits of very long transportation.

Q. That is, you think that there are too many mills there?

A. I would think that unless the general level
18335 of base prices throughout the country were quite high, so as to admit a great deal of this so-called absorption, that there would be difficulty in shipping that far enough profitably.

Q. Do you know what the capacity of any one of those mills is?

A. No, one any one.

Q. Do you know what the total capacity of all of them is?

A. No.

Q. Do you know when they were built, any of them?

A. No. I know that some of them were built back in the Nineteenth Century. The beginning was made there.

Q. Well, have you told us everything that you can with reference to the explanation of the statement that you made that there is a geographical maladjustment as to the location of cement mills?

A. Yes, I think I have said all that is necessary.

Q. And all you can?

A. Yes, all that I feel is pertinent.

Q. That is the best explanation you can make—

A. Yes.

Q. —to justify your statement, in other words?

A. Yes.

Q. Well, now, would you think it better for the public interest to have mills located at points where they would be nearer to large markets than they are now,—

18336 that is, to work out some system whereby they could be located independently of raw materials from which they made their product?

A. Oh, no. Location of industry is the resultant of a number of factors, and excellent raw materials may be offset by high freight charges, and vice versa, poor materials may be offset by low freight charges.

Q. You are satisfied, then, as an economist, that the best thing that we could do would be to continue to locate our cement mills very close to the sources of raw materials from which cement is made?

A. No, as I said, no—as I said, it is a resultant, and sometimes the freight factor, and sometimes the raw material factor, or labor factor will be the more prominent.

Q. Well, in this instance, would you not say that it is largely the freight factor that makes it necessary for them to have their mills located nearer to their source of raw materials,—which is because it costs so much to move a heavy commodity like cement, or the raw materials of which it is made?

A. Well, I—you are assuming that the cement industry there quarries its raw material and freights the mill in the same way in which the steel industry freights the ores. I had the impression that in general the cement mills that I have seen and visited, that they quarry the material, and then fabricate it, or elaborate it, right there.

18337 Q. How many have you seen, and visited?

A. Oh, I suppose, if you mean all that I have seen in the past—

Q. No, no.

A. In the past, I—

Q. All that you have visited so that you know where they get their raw materials, and how far they have to move them.

A. Oh, I suppose, half a dozen.

Q. Well, now, is it not a fact that one reason—in fact, the controlling reason—for the location of those mills close to the source of their raw materials rather than to points where there is known to be a considerable market

for their manufactured product, is because of the way freight rates are adjusted for the heavy commodity of their raw materials?

A. No, as I have said, that question cannot be answered excepting by considering the two factors, and other factors altogether. The location of industry is the result of a resultant of advantages.

Q. All right. Let us pass that for a moment, and let us take up the question of markets.

Do you agree with this, that a market is the area over which competition extends, and though it has no sharp boundaries it is clearly determined by the facility of transportation and communication?

18338 Trial Examiner Norwood: Have we not been into that?

Mr. Zimmerman: No, that is the first time that question has been asked.

Trial Examiner Norwood: Have we not been into that several times?

Well, go ahead and answer it.

Mr. Zimmerman: That is an exact quotation which has not been testified to.

The Witness: Please read the question.

Trial Examiner Norwood: Read the question.

(Las question read by reporter.)

A. No, I do not agree with that statement, although that statement is made on very good authority.

By Mr. Zimmerman:

Q. By eminent economists?

A. Yes, but it involves a danger of misunderstanding, because the term "market" there is used in the sense of market area, or the area from which customers are attracted or to which goods are shipped, and frequently the term "market" is also used in a narrower sense.

I would not dogmatically say that those authors—the author from whom you quote there—was mistaken, but I do think that it is a loose use of terms, and allows ambiguity.

Q. Before we get into the question of markets more thoroughly, Dr. Fetter, I would like to advert once 18339 more to the price situation.

Do you agree with this definition of price—that it is the amount of money for which a commodity exchanges in a market?

A. Yes, I think that about answers it.

Q. Well, let us state it this way: Price is the amount paid or required to be paid to acquire ownership of the property in question.

That is the same thing, is it not?

A. Yes, although I think it would be better to safeguard it a little.

Q. You, in your testimony, Dr. Fetter, were asked by Mr. Wooden about price, and you will recall that that was the point where you went into the exposition about how the word "horse" might be modified.

You recall that, do you?

A. Yes.

Q. Well, now, let us talk about horses for just a moment and see if we can get an example of that.

Suppose I come to you and offer to sell you a horse for a hundred dollars, and you say you would buy it, and you do, and take the horse and pay the hundred dollars. Can you tell us, in that simple question, what is the price and where the sale was made?

18340 A. I think the hundred dollars paid for the horse, and the exchange that takes place at that point when the buyer takes hold of the halter.

Q. And that is the market place, is it not, in that instance?

A. Well—no, that might be an isolated exchange; it might be a sage-brush market.

Q. Well, all the market there is, if there is any there at all, is right where that sale is made, is it not?

A. I agree.

Q. All right.

Let us take the next little step in the horse case: Suppose I live in town B, and take my horse from town B to you in town A, and I offer to sell you the horse for a hundred dollars, and you accept, pay for and receive the horse—the price is a hundred dollars, is it not, in that case?

A. As I guess it, yes.

Q. Where is the sale made?

18341 A. Where the horse is.

Q. Where is the market?

A. The same as the other question, as far as—

Q. No, it is different. I am taking it from my town over to you and offering to sell it to you in your town A,

and there you accept it and pay for it and receive the horse. Now, where is the market?

A. There is not a developed market, but as far as there is any market it is where the horse is and where the pay is given.

Q. Right?

A. Yes.

Q. In other words, it is in your town where I deliver the horse to you and get the money?

Trial Examiner Norwood: That "A" is the point where the horse is sold; is that right?

Mr. Zimmerman: That is right.

The Witness: Yes.

By Mr. Zimmerman:

Q. That is the market, so far as there is any?

A. Yes.

Q. Let us advance a little bit.

18342 Suppose I have a horse in town B, and I come to you in town A and say, "I have a horse for sale for $100," and describe it to you, and you agree to buy the horse. Thereupon I go back and get the horse and bring it to you in your town and receive the $100. The price is still a hundred dollars, is it not?

18343 A. Yes.

Q. Where is the sale made?

A. Well, I think the sale is made in that case, as there is no developed market, in the place where the buyer is.

Q. And that, so far as the question goes, is the only market there is, is the place where the buyer is, is that not so?

A. Yes, a very undeveloped—in fact, it is a question of isolated trade.

Q. Suppose I have a horse in town B—listen to this very carefully, please, sir—and I come to you in town A, and I describe the horse and offer it for sale for a hundred dollars, agreeing to deliver it to you later on. You accept the offer. Thereupon I state that I have to go into the next town and will not be able to deliver the horse immediately, but will have Tom Jones deliver the horse, and ask you, as a convenience, to pay $5 out of the hundred that you agreed to pay for the horse to Tom Jones when he delivers the horse to you the next day. Then I call Tom Jones and arrange for the delivery of the horse the next day. You pay Tom Jones $5 and send me $95.

What is the selling price of the horse?

18344 A. Well, this is getting pretty complicated, but I should say that the man has paid you $95 for the horse, and Tom Jones $5 for the transportation.

Q. Yes. I put that in the question, Doctor, so you are not telling me anything.

I am asking you, Doctor, what is the price of the horse, in such case?

A. Well, $95 is what you are getting for your horse.

Q. I did not ask you what I got for it. I asked you what the price was. Please tell me. Don't dodge the question any more.

A. I said the price was $95.

Q. I see.

A. Yes.

Q. Then our agreement was I was to take $95 for the horse—that is the price, is it, in your opinion?

A. That might not have been the wording you used.

Q. Where is the sale made, Doctor?

A. Well, if there is a horse factory, where horses are being turned out in large numbers, I should say that the horse factory would be the place; but where you are taking this individual horse trade, and a man has one horse, there is really no horse market, and it is an isolated trade, and we are sort of—sort of horse play, to call it a market at all, or a market price.

18345 A. Yes.

Q. Are you able to tell me where the sale is made, Doctor, after all this digression?

A. I have told you what I would answer to this puzzle. I would say the $95, and Tom Jones gets for his services $5.

Q. Well, that was not my question at all.

I am asking you now where was the sale made?

Trial Examiner Norwood: Where was the sale made?

Mr. Zimmerman: We have gotten past the other thing.

A. The sale was—the sale evidently was made where the men were at the time; but—

By Mr. Zimmerman:

Q. That is, in your town?

A. Yes.

Q. Where I have offered to sell you the horse?

A. Yes.

Trial Examiner Norwood: Is that town A?

Mr. Zimmerman: Yes.
The Witness: Yes.

By Mr. Zimmerman:

Q. And the market, so far as there is any, is in the same place, is it not?

18346 A. Yes.

Q. In town A?

A. A great deal is compressed in that phrase, so far as there is any.

Q. But you maintain that merely because I let you in on the fact that I was paying $5 for bringing the horse over, and asked you to pay that to him, that that reduced the price from $100, which was our bargain, to $95; is that right?

A. Yes, we are getting a very technical brain-twister distinction here.

Q. Yes, I think so.

Now, let us go on and see: Suppose that I have a horse in town B, and I write to you in town A, and offer to sell you the horse. You reply, in writing, that you will take the horse for $100, but you want it delivered in town A. Whereupon, I send the horse by one of my employees, and the horse is delivered, and you subsequently send me the $100 for the horse.

What is the price in that case?

A. Well, it is your employee, and you are therefore that far in the transportation business, as connected with the other; I should say the price was $100, you are being paid the whole amount for service that you have performed both in raising the horse and in having it delivered by one of your hired men.

18347 Q. Where is the market?

A. Well—

Q. So far as there is one?

A. Well, there isn't a market in the economic sense, there is just a barter, isolated trade.

Q. Yes?

A. Yes.

Q. Now, you may be multiplied by a dozen, and I may write to a dozen men, or more than that, in your town, and offer to sell you a number of horses.

A. Yes.

Q. Yes. Would there be any market, then, and, if so, where?

A. No, I think not. You are not putting up your commodities, the thing that you deal with, for sale, at any place. You are preferring to have a series of isolated trades, and I think, in small business, that can be done.

Q. Well, now, when does it cease to be isolated trades? I mean to say how many trades do there have to be before it ceases to be isolated, in your opinion?

A. Well, it is necessary to have a number of trades, pretty regularly carried on, and to place—

Q. Yes.

A. —and horse markets are still in existence.

Q. Now, I am not asking you anything about
18348 that, and you know I am not.

A. Oh, yes, I thought you were.

Q. I am giving you a series of suppositious cases, and asking you simply to confine yourself to them. Can you do that?

A. Yes.

Q. Please do.

A. I can, and it is necessary for me to make this explanation.

Q. What, about horse markets, here?

A. Yes.

Q. I do not think it is, and I wish you would cease it.

A. I know it is disagreeable to you to know that there are horse markets; but there are.

Q. Let us go back to our question, Doctor.

Suppose I have a horse in town B, and I write you in town A and offer to sell you a horse, and you reply you will take the horse for a hundred dollars, but you want it delivered in town A. Whereupon, I send the horse by one of my employees, and the horse is delivered to you, and subsequently you send me the hundred dollars for the horse.

My question is now, since you have covered the price, where is the market, so far as there is one?

A. It is where the horse is delivered.

Q. Right.

Now, the reason why you lowered the price to
18349 $95 a while ago when I asked you to pay Tom Jones the $5, was because I asked you to make the payment and did not make the payment myself; is that right?

A. Because you were not in the transportation business; it was not one of your employees; the amount had

to be paid separately, it was recognized as a separate transaction, it was not a cost incurred by you in selling.

Q. All right.

A. It was a cost incurred by the buyer in getting the delivery of the goods.

Q. Let us see whether or not it was.

A. Yes.

Q. Suppose I have a horse in town B, and come to you in town A, and describe the horse and offer it for sale for $100, agreeing to deliver it to you later, you accept my offer. That is, I offer to sell you the horse in your town at a hundred dollars, and then I state that I have to go on to the next town, and I will not be able to deliver the horse immediately, but I will have to deliver it to you later on, and then I go on and deliver the horse to you the next day, and you send me the hundred dollars. I having employed Tom Jones to bring the horse to you, thereupon paying him $5 for his services.

What is the price at which you buy that horse?

A. Well, if Tom Jones is your employee, I would
18350 say the price would be—I will be paying a hundred dollars. I have no knowledge or connection with the transaction with Tom Jones.

Q. No, and it doesn't make any difference whether he is my employee or not, does it,—the price is still a hundred dollars?

A. Well, you are trying to get a very technical hair-line distinction there in a situation which is not a market situation in the true sense at all.

Q. Well—

A. It is an isolated situation.

Q. I am not asking you for that.

A. It is an isolated exchange.

Q. Whether the price is still a hundred dollars, whether Tom Jones—

A. I gave my answer.

Q. —brings the horse over, the price is still a hundred dollars that you pay for the horse?

A. Yes, in this last question, if I understand you.

Q. Yes, exactly.

A. Yes.

Q. So, do you make a distinction as to whether the buyer pays the cost of transportation and deducts it from what he sends to the seller, or the seller pays the cost of

transportation,—do you make a distinction in those two cases?

18351 A. Yes, I think that that might be quite—a very important distinction.

Q. So that in every case where cement is sold, delivered cement, and the seller prepays the freight, that, in your opinion, would be an entirely different situation, economically speaking, from a situation where the delivered cement was sold, and at the request of the seller the buyer paid the freight and deducted it from the invoice?

A. No, I think it would not be essentially different, for the reason that you have shifted from the buyer of a single horse, who is selling in a single transaction in a sage-brush market, and you have shifted to the case of a larger producer who is regularly selling, every day, to scores of buyers, and, as I answered, I think the question of Mr. Leisure—I would not think the mere prepayment of the freight in this big practical problem, would be of the essence of the transaction.

It is, of course, highly advantageous to the companies to have the buyer pay the freight, but that is only an incident compared with the system of selling.

Q. Through?

A. Yes.

Q. Right.

Now, let us suppose that I said nothing about owning only one horse,—and the fact is I did not,—but let us go on and say that I own several thousand horses,—

18352 in other words, I am engaged in the business of breeding and selling horses, and I not only come to you from the town, or the farm, where I have got my horses, to your town A, and offer to sell you a horse, but on the same day I offer to sell to a score or more of other persons in the same town other horses at a hundred dollars, and each one of them, just exactly as you did, agreed that they would take the horse and that I might deliver it later to them; in other words, except my offer and each agree to pay me a hundred dollars, and each one of them does send me the hundred, and I do deliver the horse, and the horse having been delivered I pay to Tom Jones, or anybody else, $5 for each delivery, for each horse, that he has made.

What is the price in each one of those transactions,—isn't it a hundred dollars?

A. The $5 delivery is the same to every destination?

Q. Doesn't make a bit of difference. There is only one destination involved so far, now.

A. I thought you said there were a great many destinations.

Mr. Zimmerman: Read the question, please.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Yes, it is—the sale is made at a hundred dollars.

By Mr. Zimmerman:

Q. At the town?

A. At the town.

18354

Washington, D. C.,
March 29, 1939.

18357 DR. FRANK A. FETTER thereupon resumed the stand and testified further as follows:

*Cross-Examination by Mr. Zimmerman (Continued).*

Q. Yesterday we last dealt with the suppositious case of where I have a horse in town B and write to you in town A and offer to sell you the horse; you reply you will take the horse for a hundred dollars; but you want it delivered in town A. Whereupon, I send the horse by one of my employees, the horse is delivered, and you subsequently send me the hundred dollars for the horse.

Now, we got as far as agreeing, I believe, upon the price being a hundred dollars.

Where, in that case, is the market,—is it in town A?

18358 A. There is no market in any true sense of the term; that is comparable to forestalling as was understood in the Middle Ages; that is, the individual going out and dealing—the seller going out and dealing with a single customer not in a market.

Q. Well, now, since we bring in the subject of forestalling, and you think that is of interest here, let us go into it for just a moment.

Forestalling, as it was understood in those times, was going out before the goods reached the market, and heading them off; and acquiring them so as to prevent them from appearing in the market for free sale; is that not so?

A. Yes, the policy of the Middle Ages was to—

Q. Never mind about the policy in the Middle Ages, I just want to know if that is forestalling, or not?

A. I think that was true, yes.

Q. Thank you.

Now, what did that have to do with the sale of a horse as I gave it to you in this suppositious question?

A. It had this to do, that the policy of the Middle Ages was to create markets, because when isolated trades of that sort occurred you did not arrive at what they considered to be a just price.

Q. Do you think you can bring that down to modern times and tell me where there was anything in my question that indicated anything about forestalling?

18359 A. Yes.

Q. All right, do so.

A. I have already indicated.

Q. Well, what fact in the question indicated that there was any forestalling involved?

A. Well, it is an isolated trade where there is just one buyer and one seller.

Q. Is every isolated trade an example of forestalling, in your opinion?

A. It has strong analogous traits, yes.

Q. Well, what particular fact in the isolated trade would liken it to forestalling, in your opinion as an economist?

A. That it was not in a true market.

Q. What is wrong with the market that makes it anything else but a true market?

A. Because it is not a market; it is an isolated trade.

Q. And so there isn't any such thing as a market where there is only one sale; is that it?

A. Well, when—yes, that's true.

Q. How many sales have to be made before you would say there is a market?

A. I will not attempt to draw the line.

Q. You already do so. You say one is not. Now, how many would be?

A. I shall not attempt to make a formal rule.

18360 That is always the case in every practical affair in life, you have to decide more or less, and those are the questions that very largely the courts have to decide.

Q. It is just too much for the economist, is it?

A. Yes, it is going beyond his function.

Q. I see.

A. And his duty, yes.

Q. Now, so far as there is any market in the transaction, the market would be at town A, would it not,—even though it was not exactly a true one, as you put it?

A. When I have said that it is not a market in the economic sense, it seems to me quibbling to say "so far as there is a market."

18364 Mr. Zimmerman: Read the question, please.

Trial Examiner Norwood: Read the question.

(The last question was read by the Reporter as follows:

"Q. Suppose that I have a number of horses, a large number that I am engaged in selling, and that I am located at or near town B, and I write to you and a

18365 number of other persons, and offer to sell in town A, where you reside, horses to each one of you, and each of you reply that you will take the horses for $100 apiece, but each of you want the horses delivered in town A, and thereupon I send the horses by my employees, and the horses are delivered to you, and each one of the others, and each one of you, the whole group, each in turn send me the $100 that they agreed to pay for the horses, is not the price in each instance $100?")

A. Yes; I am inclined to say that the delivered price is $100.

By Mr. Zimmerman:

Q. Well, there isn't any other price than the delivered price, is there, in that transaction?

A. Oh, yes, there is always a possibility of analyzing a delivered price if you—

Q. You can take it to pieces and find some other price in that picture.

18366 A. Yes, but in that case there is a delivered price, that is the only—

Q. Well, is there any other price there in the picture that you can tell us, and, if so, please tell us the amount of it.

A. No, I think in that case—of course this is purely a moot question, the seller is offering, according to the assumptions in the question,—is offering to sell only at that place, and he is offering to sell and deliver at that place.

Q. Can't you tell us—

Trial Examiner Norwood: Well, he is not assuming

that this is an actual case. It is a hypothetical case, is it not?

Mr. Zimmerman: Why, yes, of course.

The Witness: Of course I am answering on the assumption that it is a hypothetical question.

By Mr. Zimmerman:

Q. How long would it take you to tell me whether or not there is more than one price involved in that transtion,—couldn't you answer it "yes" or "no"?

A. No, there are many puzzling problems presented when you have such a variety of factors, and there might be something that would escape my attention in an extemporary offhand answer.

Q. Can you think of any other than a delivered price in that transaction? Now, imagine, and see if you can
18356 figure out any other one.

18367 A. No, a regular market price is a delivered price without any extra freight, and that has been the place where the goods have been offered for sale, and delivered, and there is no freight factor with which the buyer has to reckon outside at all.

Q. I take it, you mean that there is no other price than a delivered price in the picture? That is your way of saying it?

A. As I see it, in that picture that you draw there, there is not.

Mr. Zimmerman: This illustrates why it takes so long.

By Mr. Zimmerman:

Q. Now, Dr. Fetter, where is the market in that instance, in the case that I have given you?

A. Well, if the twenty transactions are all—

Q. Did I say twenty?

A. I think you said twenty.

Q. You just do not seem to be able to distinguish between fact and fancy.

A. Well, a number of transactions, whatever is the number you mentioned.

Q. All right, go ahead.

A. Yes. If they are all public and open, and the
18368 buyers are all present at the same time, it would begin to take on something more than the semblance of a bargain.

Q. Oh, excuse me, Doctor—the buyers could not have

been present any place except in town A, because this is the situation where we wrote to each one.

A. Yes.

Q. We did not gather them together under one tent, anywhere.

A. No, no, that is true.

Q. Now, does that destroy the possibility of there being a market, because the transaction was by letter, written separately to each prospective buyer?

A. Yes, they are being dealt with separately, quite separately, without a common knowledge, and I think it could still lack the essential characteristics of a market.

Q. You would still say that?

A. Yes.

Q. That there was no market?

A. Yes.

Q. Or market place?

A. Not in the essentials necessary for a competitive market.

18369 Q. All right; thank you.

Suppose that I am engaged in operating a horse farm with several thousand horses, which I sell from time to time to persons who desire to buy them, and suppose that in town A there are a group of people who desire to buy horses such as I have, instead of me writing to them to offer my horses, they write to me and ask me to sell them horses, and I write back and tell them that the horses at town A, delivered to them, each one of them, will cost a hundred dollars a piece, and they write back and accept the offer, and pay the hundred dollars.

Now, is there any doubt in your mind but what the price is a hundred dollars in that case?

A. No, I am inclined to think that the price is a hundred dollars, if they are not delivered by common carrier.

Q. All right, suppose I deliver them by common carrier, to-wit, railroad, load them on railroad cars, and send them to town A, and there I deliver them to the buyers and collect the $100 either by hand or they mail it to me, it does not matter which, does it?

A. (Witness makes no audible reply.)

Q. Now, then, in that instance, is the price a
18370 hundred dollars for each horse?

Mr. Wooden: Your Honor, I object to the ques-

tion, unless it be shown in the question as to how the transportation cost to the common carrier is paid.

Mr. Zimmerman: I am not bound to suppose any facts in that question like that until I come to it.

Trial Examiner Norwood: The objection is overruled. You can bring that out.

Mr. Zimmerman: Read the question, please.

Trial Examiner Norwood: Read the question.

Mr. Zimmerman: Unless you remember the question, Dr. Fetter?

Do you want the entire question read?

The Witness: Yes, because it is a complicated question.

Trial Examiner Norwood: Read the entire question.

(Last two questions and the answer were thereupon read to the witness.)

Q. Now, will you answer, please?

A. Yes, I think it is.

Q. All right, thank you.

Now, let us go on from that for a moment and take Mr. Wooden's suggestion.

Let us assume that in the question I have just
18371 asked you, of course somebody has to pay the freight, and let us suppose I have paid the freight, so that you and the others in town A have nothing whatsoever to do except to pay the $100; that fits in with the answer that you made, that is what you were supposing, was it not?

A. Yes.

Q. When you said the price would be a hundred dollars?

A. Yes.

Q. Now, yet us suppose instead of me paying the freight, that the freight is $10 a piece, on each one of those horses, and I suggest to you, and every one else who is buying those horses in town A, that you pay for me, and in my stead, the $10 freight, and send me the balance of $90, and I will close your account as fully paid.

What, then, is the price of the horses,—is it not still a hundred dollars?

A. No, because I think there is a separate transaction there with common carriers, and then the buyer is entitled, under our system of liberty, to deal with the common carriers. The rates on common carriers are determined by public agencies, and the citizen has the right of

access, and no matter how you would define the price in these cases it does not settle the large question of public policy.

Q. I did not ask you in my question anything about the settlement of public policy. I merely asked you
18372 what the price of the horses was.

Now, if it was not a hundred dollars, what was it?

A. If the buyer—I think that it was $90—if the buyer's transaction was with the common carrier, and he pays the common carrier, then clearly the transaction on the part of the seller has not been completed; that is, he has not completed his production of the goods including place value before he sold.

Q. The sale is made at town A, do not forget that.

A. I—

Q. And, as you said, there is no price until the sale is made, and title passes, and that is where title passes, is it, at Town A,—is it not?

A. I—

Mr. Wooden: Your Honor, I object to that as calling for a legal conclusion in a field in which Dr. Fetter has no—pretends to have no expert knowledge at all. It is a question for ultimate decision by the tribunals into which this case may go.

Mr. Zimmerman: With all due respect to Counsel, that is nonsense.

I am using Dr. Fetter's own language when he said in his own testimony, and I can give you the page of the record, and he will not deny it, that there is no price until a sale is made.

18373 Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. Wooden: Clearly that is a legal question.

Trial Examiner Norwood: Yes, I think so, too.

The objection is sustained.

By Mr. Zimmerman:

Q. Well, have you any doubt in your mind as to where that sale takes place? You do not want to change your answer about that now, do you, and say that it takes place some place else than town A?

A. No, I don't want to change my answer, but I have a good deal of doubt about all these subtle legal questions.

Q. Which one?

Trial Examiner Norwood: Well, as an economist, how would you figure that?

The Witness: On the general principle that I have expressed, that where the goods are definitely offered for sale, and the seller has incurred the cost, their past cost to him, there, it seems to me, the sale would be made, in an economic sense.

I am not passing on the legal sense.

By Mr. Zimmerman:

Q. You say "there"?

A. Yes.

Q. What do you mean by "there"?

18374 A. At that point where the goods have been taken, still owned by the seller, and there offered for sale.

Q. That is at town A?

A. I suppose in this case it would be.

Q. Yes.

A. Yes.

Q. All right. It just makes it a little clearer, that is all, if you refer to it in that way.

A. Yes.

Q. You have not finished your answer? I did not mean to interrupt.

A. I think so.

Q. You think you made that clear?

A. I think so.

Q. All right.

Do you desire now to change the answer that you made yesterday afternoon, where I believe you said, in substance, that it was no difference, really, as to who actually paid the freight, whether the freight was paid by the shipper in advance, or he asked the buyer to pay it for him?

A. Are you quoting my exact words?

Q. No, I am not.

A. I thought not.

Q. I am asking you now, is that not so? There isn't any difference?

18375 A. No, you are not quoting my exact words.

Q. I am asking you now, is there any real difference as to whether the seller pays the freight in advance, without saying anything at all on the bill about it, or whether he discloses the amount of it to the buyer and

says: "Will you please pay it and deduct it from what you owe"?

A. My statement, if I recall the passage, was to the effect that that might not be of the essence of the transaction, it might be a mere technical form of contract.

Q. Well, let me read this to you, then.

A. Yes.

Q. This applied to cement.

(Reading from record):

"So that in every case where cement is sold, delivered cement, and the seller prepays the freight, that, in your opinion, would be an entirely different situation, economically speaking, from a situation where the delivered cement was sold, and at the request of the seller the buyer paid the freight and deducted it from the invoice?"

And you answered:

"No, I think it would not be essentially different, for the reason that you have shifted from the buyer of a single horse, who is selling in a single transaction in a 18376 sage-brush market, and you have shifted to the case of a larger producer who is regularly selling, every day, to scores of buyers, and, as I answered, I think the question of Mr. Leisure—I would not think the mere prepayment of the freight in this big practical problem, would be of the essence of the transaction.

"It is, of course, highly advantageous to the companies to have the buyer pay the freight, but that is only an incident compared with the system of selling."

Now, that is still your answer, is it not?

A. Yes, that answer stands.

Q. So, it really does not make any difference whether we have multiple sales of horses, or multiple sales of cement, whether the freight is prepaid by the seller or the seller asks the buyer to pay it for him and deducts it from the invoice, does it?

A. That is not what I said.

Q. I am not asking you what you said.

Mr. Zimmerman: Will you read the question, please.

The Witness: You are asking me a question there that implies that you are re-stating my answer.

Mr. Zimmerman: Oh, nonsense. Please answer the question, Doctor.

The Witness: It is not my answer.

18377 Trial Examiner Norwood: Let him answer.

Mr. Zimmerman: Shall we read the question?

Trial Examiner Norwood: Do you have any further answer to make?

The Witness: No, I have none.

Mr. Zimmerman: Will you read the question? He has not answered the question.

Trial Examiner Norwood: I think he has answered the question.

Mr. Zimmerman: If the Examiner please, I submit that he has not.

Will you please read the question?

Trial Examiner Norwood: I might say, even so, I still maintain, and emphatically, that he has answered the question.

Mr. Zimmerman: May we have the question read?

Trial Examiner Norwood: Yes, read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: Have you any further answer to make?

The Witness: None, excepting that I cannot see why the Counsel has the right to call my answers nonsense, and I am not allowed to give my opinion as to his questions.

Trial Examiner Norwood: Well—

18378 By Mr. Zimmerman:

Q. I haven't any objection to your giving your opinion on the question, as long as you answer, Doctor.

A. I have answered.

Mr. Zimmerman: Well, if the Examiner please, I maintain that he has not, and I ask that the witness answer the question. I ask that he be directed to answer the question. He has not answered it at all.

Trial Examiner Norwood: I think that I shall reject the question on my own motion.

Mr. Zimmerman: To which I object. On my part, I don't think that that is the proper thing to do.

Trial Examiner Norwood: Therefore, the question is rejected because it appears to me, and the witness says, that it is a wrong characterization of the testimony that you just read.

Mr. Zimmerman: I do not think it is, but if Your Honor feels that it is, why, there is nothing that I can do about it, except to object to Your Honor's attitude in the matter, perhaps.

18381 Q. Suppose we assume that the freight is paid by the seller instead of being paid by the buyer and deducted from the invoice. Would that change or alter your position and your answer as to that long hypothetical question?

A. The final question; that was all the statement of the assumptions; the final question was, "Tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which you have become familiar in the course of your studies and experience", and my answer to your present question would be that I think it would not change the answer.

Q. That was not your final answer and you only comment upon Mr. Wooden's question.

A. That was my answer to the question that you are quoting, yes.

Q. That was not all of your answer, was it? Would it make any difference, in your opinion, of the method of selling whether there was any freight paid by the buyer and deducted from the invoice or, on the other hand, the freight was paid by the seller?

A. I submit that I have repeatedly said that that difference is not of the essence of the transaction.

Q. It is not material at all, is it?

18382 A. It is not of the essence of the transaction.

Q. Is it material, at all?

A. Everything is material, some way.

Q. To what extent is it material?

A. Well, it makes a practical difference that the buyer pays the freight out of his pocket and remits the balance to the cement company, whereas the cement company would be out of money for a considerable time and, of course, would have money to—

Q. Outside of that, it makes no difference, does it?

A. I have said it is not of the essence of the transaction, as regards your question; whether this corresponds to the competitive method of pricing "with which you have become familiar in the course of your studies and experience".

Q. Now I am asking you whether there is any material difference at all outside of the one that you have just mentioned, that money is advanced in the one case by the seller instead of having it paid—

A. No, I think the material difference would be that

there is—the material fact is that there is no market at which the buyers are permitted to assemble and to know what prices are being charged to each of them so as to be able to compare their treatment by the company with that of other buyers.

18387 "Q. Now, from the standpoint of the economist, Dr. Fetter, utility of time, utility of place must always be considered and included in defining price; is that not so?"

A. Yes, and I understand that to mean that price is relative to a definite time and definite place.

By Mr. Zimmerman:

Q. Thank you.

But, a commodity like cement, from the economist's point of view, is a different thing at the mill then it is when it reaches the railroad switch track alongside of the buyer's destination, is that not so?

A. Yes, economically, as to value; physically, of course, the same.

Q. I am only asking you now, from the economist's viewpoint you treat it is a different commodity, don't you?

A. No, as a commodity slightly modified, as to the conditions.

Q. All right.

A. Sometimes it is said that it is a different commodity.

18388 Q. That was your purpose in—

Trial Examiner Norwood: Another good has been added to it, hasn't it; utility, whatever you call it?

The Witness: Another desirable quality.

By Mr. Zimmerman:

Q. That was your purpose in giving this exposition of the manner in which the word "horse" could be modified, as you did at record 17651, wasn't it?

A. That had a broader purpose.

Q. If a commodity is offered for sale delivered at a particular destination, it has had added to it the good or the utility of transportation to that destination, hasn't it?

A. Yes.

Q. So when wheat, for example, is offered for sale at the Chicago market and put on the siding there, in Chicago, it is delivered wheat, as the economist would describe it; is that not so?

A. No, I think the use of the term "delivered wheat,"

there, would be likely to confuse it with the problem of delivered prices.

Q. It might make it identical with delivered price, but it wouldn't confuse it, would it, Doctor?

A. It would probably involve confusion of thought because that is wheat at the market brought to the market by the seller.

18389 Q. If you just changed the word "wheat" into cement, your answer would be the same, wouldn't it?

A. Yes, if the cement were brought to a market and there offered to the market, it would be the same answer.

Q. Exactly.

Trial Examiner Norwood: In the case of an added good like transportation, suppose you want a price of the first good and the price of the second good; would the term "price" specify which amount was named or proposed for sale?

The Witness: No, Your Honor. I think not, because, as I have said in another connection, the term "price" may be used in a broader sort of generic sense or, may be used in a narrower specific sense.

Trial Examiner Norwood: Then the first good might have one price and the second good might have another price, is that right?

The Witness: Yes.

Mr. Wooden: May I have the Examiner's last question read?

(The Trial Examiner's question was read.)

The Witness: May I see that I understand the statement, Your Honor—you mean the same good after some change has been made. You call that the second good?

Trial Examiner Norwood: Yes.

18390 The Witness: Yes; that is the way I understood it.

By Mr. Zimmerman:

Q. Now, if an economist of national repute had testified in this case before you that you could not separate price by fixing a price for each one of these utilities or goods added, would you differ from that? I mean, now, from the economist's viewpoint?

Mr. Paulson: May we have the question read?

Trial Examiner Norwood: Read it.

(Question read.)

A. No, I would not differ or agree until I had all the context and circumstances before me.

By Mr. Zimmerman:

A. All right.

Now, if as each utility is added to the product, from the economist's standpoint, it does amount to a mutation and changes the article, from the economist's viewpoint, into a different commodity, does it not?

A. Yes; that is sometimes the way it is expressed, or, again, it is expressed that the commodity itself takes on new qualities.

Q. That is right.

A. Yes, either way; and I think, ordinarily, there would be no confusion between the two.

Q. In other words, to be exact, as an economist
18391 attempts to be, he tries to use terms so that it will nicely and adequately and precisely describe the commodity in the condition in which it is after things have been added to or taken away from it, as the case may be?

A. Yes, he tries, but he doesn't always succeed.

Q. So if, for example, if you would consider cement as it is offered for sale in Chicago, you might, without violation to your meaning, refer to it as Chicago cement, might you not?

Mr. MacIntyre: If Your Honor please, we want to know whether or not this is a hypothetical question or whether or not he is calling for the Doctor's knowledge as to how cement is sold in Chicago.

Mr. Zimmerman: I haven't even talked about selling it, yet.

Trial Examiner Norwood: I think he is trying to elicit an explanation or an expression of economic theory, here.

Mr. MacIntyre: He says, now, as cement is sold in Chicago. Let us have the question read.

Trial Examiner Norwood. Read it.

(Question read.)

Mr. Zimmerman: You see, I haven't sold it, yet.

The Witness: Yes. It might be modified by the name of the town where it is at the moment.

18392 By Mr. Zimmerman:

Q. And when it is sold at Chicago and delivered to a dealer there, then we might refer to it, at least, as "delivered cement", might we not?

A. Delivered in Chicago?

Q. Yes. Delivered cement or delivered Chicago cement, if you like.

A. Yes.

Q. And if it were delivered to a dealer who intends to put it in his warehouse and offer it for re-sale—that is, to sell it at retail—we might refer to it as "wholesale delivered cement," as it goes into his warehouse, being sold to him wholesale; that is correct, isn't it?

A. Yes; I assume that you are giving the trade names, here.

Q. No, I am trying to use economist's terms, Doctor, not trade terms, and if the economist objects to that, let him tell me now.

A. I know of no technical use of those terms you speak of in economics that is different or peculiar. There may be, but I am not acquainted with them.

Q. You don't object to it, as an economist? That sounds—

A. No, they don't seem to me to be objectionable terms.

Q. And when it is retailed—sold to the consumer, then it is "retailed cement"?

A. Yes; in the same way, I think, you might say that.

18393 Q. Then when cement mills sell cement at Chicago and there deliver it to their customer, we may say that they are engaged in selling delivered cement, may we not?

A. Yes. As I have said before—

Q. Never mind what you said before. You have answered my question now, if you please, sir.

Trial Examiner Norwood: You can make a further explanation.

Mr. Zimmerman: I do not desire that the witness go back over what he said before. That is not essential. Whatever he said before is in the record.

Trial Examiner Norwood: The witness has some rights, too, you know. He answered the question and he may add any reference to his previous testimony that he wants to.

Mr. Zimmerman: That is in the record for anybody to see, and I object to him doing that.

Trial Examiner Norwood: The objection is overruled. Go ahead.

A. As I have said, in a local market the goods are delivered and that is what you may call the limiting case of freight. It is the point where they are delivered without

any freight costs at all, but they are delivered into the possession of the buyer, nevertheless.

By Mr. Zimmerman:

18394 Q. Now, as to this commodity which we have been talking about, delivered and sold in a destination, like Chicago, for example, at a definite price there, and delivered to a customer there. The price of delivered cement for that would be the price under the statement included in the question, would it not, Dr. Fetter?

A. Yes, delivered at the place—

Q. That is right.

A. —where the cement is at the time of the sale.

Q. Now, in what way, in your opinion as an economist, Dr. Fetter, could a mill compete in price with other mills—other than by making—if they are selling, now; if they are engaged in selling delivered cement—other than by making a price at the point where the competitor is offering delivered sale for cement equally as low as the price for delivered cement made by the competitors at that point?

In other words, by meeting the price at that destination of delivered cement?

18395 A. He could make a mill price so low that when the buyer has paid the freight himself it would give a final delivered cost to the buyer less than that which would result from the offer of the competitor.

Q. That cost—by that you mean a cost at the destination?

A. Yes; the cost to the buyer, I say, not to the seller.

Q. Yes. So that the buyer would thus get a lower price instead of simply an identical price?

A. If they bid—yes. That is the way to insure a sale.

Q. All right. Now he could also do it by making a price for delivered cement, for example, at Chicago lower than the delivered price there quoted by his competitor, could he not?

A. You mean the delivered price at destination?

Q. I am talking about a price for delivered cement at Chicago.

If you don't understand the question, I will ask it be read.

A. No, I don't quite get that question.

Trial Examiner Norwood: Read the question.

The Reporter: "Now he could also do it by making a price for delivered cement, for example, at Chicago lower than the delivered price there quoted by his competitor, could he not?"

A. Now this question refers to the sale in Chicago?

18396 By Mr. Zimmerman:

Q. Exactly. It refers to the sale or offer for sale at Chicago of delivered cement.

A. In Chicago.

Q. In Chicago; delivered Chicago cement, if you please.

A. Where there is no freight charge?

Q. I haven't said anything about freight charge at all. I have talked about delivered cement. That is the commodity we worked out the formula for in Chicago with all the goods or utilities added to it up to that point, where it was offered for sale as Chicago delivered cement.

A. Now the question—

Q. What I am asking you—in order to save time and not go back over the record—is this: Would not it be competition, in your opinion, if any mill offered a price for delivered cement in Chicago lower than other mills were offering it there?

A. Yes, it would if it is offering it lower.

Q. Now let us suppose that the offer is made; just in order to make it simple and understandable; let us suppose that the market quotations on delivered Chicago cement in Chicago are $2 per barrel, and then a mill comes along and offers to sell delivered cement in Chicago, that is, delivered Chicago cement, for $1.90. That would be competition, in your opinion, wouldn't it?

18397 A. Yes.

Q. Now if the other mills before the transaction were closed should lower their prices for delivered Chicago cement to $1.90, would that be competition?

A. Yes, that would be a move toward competition.

If, however, they are in danger of losing the sales, they had better lower it to $1.89.

Q. All right. Let us use a little easier figure; let us say $1.85, just for example. Some other mill comes in, now, and offers delivered cement, Chicago delivered cement, at $1.85 a barrel. That would again be competition, wouldn't it?

A. Yes, that would be the first step offering—making a lower offer.

Q. Now let us assume one more element in this question and that is that there is no mill in this picture that has any means of manufacturing cement at a cost of less than $1.50 per barrel. That is the very lowest cost there is.

Now let us suppose that some one of these mills in the picture is quite strong, financially, or thinks it is—it doesn't matter—maybe it only thinks it is, and let us suppose that they keep on with this process of going five cents a barrel lower, back and forth and round about until, finally, this mill that thinks it is strong enough to do it, bids $1.45, or five cents below cost.

18398 What is your opinion as an economist of that situation; is that competition?

A. It is not a socially desirable competition. It would be competition.

Q. It is what you would call destructive or socially undesirable competition, isn't it?

A. Yes, and the great financial interests might be able to do it, and that is what you would call cut-throat competition.

Q. Yes. And if they did that with the tendency to put any other mill out of business or to prevent them from competing with them in that market, there, in Chicago, that would be a form of monopoly, would it not?

A. No, I would not call that a form of monopoly. It would be an unfair competitive practice; and unfair competition is one of the strongest tools and agencies of monopoly.

Q. You would say it was merely a tendency which would produce, if carried on, a monopoly?

A. It is a method.

Q. Of producing a monopoly?

A. Yes; it is a process.

18407 (Last question read as follows:

"Q. Doctor, assume that a large contractor or since, in these modern times, governments have stepped into the shoes of contractors in the matter of building large public works like bridges and dams and so forth, assume that we will include a government, State, or national, is in the market there for a large amount of, say, several thousands or hundreds of thousands of barrels; maybe run into millions of barrels; assume that, of cement, for a specific job.

"Understand what I mean by that: I mean a single large job, and we often use the term for convenience, we call such a contract as that a specific job contract.

18408 "Now, in soliciting bids on such a contract everybody knows that the work may take several months or, sometimes, it may run over a year so that the cement could not conveniently be delivered to the job all at once.

"Let me assume something more for you which you may not know, that cement is a perishable commodity. Even if you put it in the best of silos it may set, to a certain degree. You can't store it safely for an indeterminable length of time; so that it is necessary for them to make a deal but to have the cement shipped in quantities as needed from time to time over a long period of time.

"Would you, in such a case, consider it economically good practice for the persons who are soliciting bids for such a supply of cement to insert a clause in their contract which protects them against price decline at the destination where they may want the cement?"

Mr. Zimmerman: Now, for the record, if Your Honor please, Your Honor rules that I may have an answer to the question?

Trial Examiner Norwood: Yes, the objection was overruled.

Answer the question, Doctor.

18409 A. Yes. That is a matter of practice, of practical expedience, and I have no knowledge of the practical problem that would prompt me to suggest that freedom of contract should be interfered with there.

By Mr. Zimmerman:

Q. Well, now, Doctor, assume that such a contract is made by a mill, and it has not delivered anywhere near all of the cement required under that contract; you may assume that the contract is made for delivered cement to be delivered at destinations which are within the mill who has entered into the contract, and that mill's territory where it has an advantage freightwise over other mills.

Now, if they have several hundred thousand barrels of cement yet to be delivered to those destinations, and then there is a new demand for cement at or so near those same destinations that the delivered cost,—that is, the cost of transportation to the new point of demand is the same as the destination or destinations where they are bound to

deliver cement under their unfilled specific job contract, and assume that some other mill comes into their territory where, and when the mill that has the advantage of location puts out an offer to sell cement no lower than that made on the specific job contract, and the new mill, or the outside mill, offers cement at those destinations at a price which is identical to that made for delivered cement at those destinations, by the mill that has the advan-
18410 tage of location, do you understand that if the mill that has the advantage of location, as I have described, and that has the unfilled or unshipped balance of the specific job contract on its hands, lowers its mill base, or lowers its delivered price, at those destinations involved in the specific job contract, it must, under the price decline clause thereafter reduce its contract price for the specific job just to the same extent that it reduces its mill base, so that when freight is added to the destination the delivered cost, or the price of delivered cement, there, is less than the price fixed in the contract?

Is that clear to you?

A. That is a statement of the nature of the contract that we speak of?

Q. Yes, I am just trying to ask it so that that is all clear to you.

A. Yes, I think so.

Q. Now, from the standpoint of the economist, can you understand why the mill who has the specific job contract on its hands would hesitate to lower either its mill base or its price at the destination, for delivered cement?

A. Yes, I can.

Q. Would that hesitation, and, in fact, its action in not reducing its mill base, or its delivered price at those destinations, be economically wrong, in your opinion?

18411 A. Yes, it would not be competitive. When it made that specific job contract it was a free agent, and it was entering into a free contract, which involved certain conditions which you have described.

Now, the fact, that those conditions prove, in the course of events, to be rather embarrassing and distasteful, that was all involved when it entered into the contract. Business is the taking of risks, and that was a fair risk for it to take if it thought it was to its interest.

Q. Would it not be facing the possibility and proba-

bility of a very serious loss if it did reduce its mill base or its destination or price for delivered cement in such a case?

A. Yes, of course. Loss is involved in fulfillments of contracts.

Q. Now, as you say, there is no way that the mill has of writing the contracts for contractors and dictating to governments that step into the shoes of contractors, so as to prevent them from inserting the price decline clauses, is there?

A. No, the prospective buyer may ask for such conditions as he thinks are desirable, and the other party may agree to them if he thinks it is to his interest.

Q. Now, there is another phase of it that I want to ask you about, too, Doctor.

Not only may such mills be faced with a serious loss in having to reduce its contract price on the specific job
18412 contract, but it may also have numerous similar contracts outstanding with some of its large dealers in the same territory who are also at liberty to insist upon price decline agreements.

You understand that, too, do you not?

A. Yes.

Q. So that if the mill hesitated or failed to reduce its mill base, or its price at destination, for delivered cement, it might also seriously involve a loss in profits or good will with the dealers with which it transacted business, might it not?

A. I am not sure I just understand what it is there. I would like to have that latter part of the question read.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

By Mr. Zimmerman:

Q. And I am referring now to the class of dealers that may have agreements against price decline.

A. Yes, if it fails to fulfill its agreements and protect them against price decline when price has declined, of course.

Q. Did you know of the existence, or take into consideration the existence of such price decline clauses when you were answering Mr. Wooden's hypothetical questions?

A. No, I simply assumed that whatever legal contracts are in existence will be fulfilled by honorable firms, and I think they are.

18413 Q. Now, as to the matter of substitutes that compete with Portland cement; I mean, commodities

that may be substituted and used interchangeably with Portland cement. You do know, as a matter of fact, that there are a number of such commodities, do you not?

A. Oh, yes.

Q. That is a matter of common knowledge?

A. Yes.

Q. Well, does not the existence of those commodities, and their offering at various destinations, in the form of delivered commodities, tend to affect the pricing of cement as those destinations as a delivered commodity?

A. Tend to affect the pricing?

Trial Examiner Norwood: Do you want that read?

The Witness: I have the words but I am not just sure what is meant.

By Mr. Zimmerman:

Q. Ask me, if there is anything about it you do not understand.

A. Tends to affect the price—do you mean change the motive of the sellers of cement as to the lowering of the price, or raising the price?

Q. Not the motives, but the actualities.

A. The interest and advantage to them?

Q. Does it tend to affect the lowering or raising
18414 of prices of cement delivered and treated as delivered cement at such destinations where the other commodities are offered in the same way?

A. If I get the purport of the question,—and I think I do,—I would say that just to the extent that there is commodity competition, substitute competition; of course, each industry has to adjust its policy and its action as far as it can, to meet that competition.

18418 Q. Yes.

Now, referring to sales made by cement mills to their customers, the subject of receiving variable mill nets, and which you said in your opinion amounted to discrimination as between such customers,—that was your statement, was it not?

A. I think so.

Q. All right.

By "discrimination" did you merely mean that there was a difference in mill nets, or in the net return, without any other implication than that?

A. Yes, I think that was it as between—the difference as between the customers of the mill in question.

18427 Q. And when you say "undersell," you mean undersell at delivered prices, don't you?

A. Yes, at delivered prices, and also at base prices, if he is selling at a uniform mill price.

Q. Because you always take into consideration, in the matter of underselling, the cost of the transportation
18428 to the point where the customer wants the product; is that not so?

A. Yes.

Q. All right. Let us go on further:

Take a territory—it does not make any difference about the shape of it at all, because it would be variable in accordance with the geographical location of the mill—but take a territory where a mill for some distance around its mill has an advantage freightwise of other mills that are located outside of that circumscribed area. Now, as to your theory that mills located outside of that area should not be permitted to come in and sell delivered cement in this first mill's area of advantage at a price which just equals the price of delivered cement quoted by the mill within that territory of advantage, if you kept the outside mills away, wouldn't one of the results be—I think we can refer to it easily by calling the mill that has the advantage the inside mill——wouldn't one result be that that inside mill could quote any price it pleased up to the very limit of advantage that it had freightwise?

Mr. Wooden: Your Honor, I just merely wish to point out that that is going over ground that has been gone over again and again.

Trial Examiner Norwood: Read that question.

(Last question read.)

A. Yes, to the limit of advantage that it had
18429 freightwise to the geographical margin, but it could not, as non-basing-point mills do now, absorb also all the advantage of phantom freight inside of that area.

Mr. Wooden: You said "base-point mills."

The Witness: No, non-basing point mills, I corrected myself,—that is non-basing point mills do not.

By Mr. Zimmerman:

Q. The idea would be, would it not, in your viewpoint, or at least greatly desirable as an economic condition, to greatly increase competition between all the mills, to increase them as much as you could?

A. No, because I think that word "competition" is so

loosely used. I would not encourage unfair competition; I would not encourage competition that was of a cut-throat variety; I would not encourage competition by secret and cut-throat prices.

Q. Well, outside of that, would you think whatever there is left of competition, after eliminating all that, would you think it would be an improvement if you could increase competition, and the number of mills competing with one another?

A. Not necessarily the number of mills geographically in the same territory; I think mills should be of an economic size, and—

Q. How would you determine an economic size?

A. Well, that is determined by trial and error,

18430 they seem to range from a quarter of a million dollar capitalization to three million dollar capitalization.

Q. Well, is there any way of determining, that you know of as an economist, what would be the proper size, economically?

A. No, that is a matter of practical judgment; has to be worked out in each situation.

Q. It would be, as you say, trial and error, so that after you had spent maybe three million dollars on a mill you would find that that was not quite in a position under conditions existing of making any money,—would you think that the thing to do would be to abandon that and build a less expensive mill?

18431 A. The trial and the error doesn't begin with just one mill. There have been a great many mills constructed and every investor has before him the experience of others and his investment should not be like Adam in the Garden of Eden, but rather as a businessman studying the result of former investments.

Q. I don't remember Adam had much of an investment in the Garden of Eden. Do you, Doctor?

A. I was thinking of Adam coming out into the world.

Q. That is going back quite a ways, isn't it?

A. Yes.

Q. We will go back quite a ways in a moment, but let us finish this, first.

Would you think it a good thing, economically speaking, perhaps, to work out some equitable method of weeding out inefficient, obsolete production units?

A. No, I am not a national planner.

Q. Do you think it would be a good thing if it could be done to work out a plan where the prices would all be f.o.b. mill and all the same?

A. No. I think the fixing of the f.o.b. mill should be the task of the private investors as they have been subjected to such general outside regulation as will bring about the maximum practical degree of competition. I do not believe in interfering inside of the management or of increasing the bureaucratic functions of government beyond the
18432 absolutely irreducible minimum.

Q. How would you determine this question—

Mr. Zimmerman: Excuse me.

Will you read that last answer before you go?

(Last answer read.)

By Mr. Zimmerman:

Q. Now, how would you as an economist determine the maximum practical degree of competition?

A. That is the task of public officials.

Q. It is an economic question, though, isn't it?

A. No, not practical adjustment. The economist has to form his opinion about things.

Q. Well, how would you go about formulating an opinion as to when the maximum practical degree of competition had been reached?

A. Well, even that I should try to work out step by step.

Q. Well, what would be the first step?

A. Abolish the basing-point practice.

Q. Then the second step?

A. I would wait a while and see what happened. I think it would be for the benefit of the industry and for the benefit of the consumers.

Q. You think it would be a lovely experiment, do you?

A. The industry, of course, does not think so.

Q. Well, I am asking you what you think, not
18433 what the industry thinks.

A. I think it would be advantageous.

Q. Assume, Dr. Fetter, if you will, please, that neither the buyer nor the seller of a product such as cement, or any product similar thereto or competing therewith, had to pay any cost of transportation in connection with the sale or purchase of the commodity; in other words,
18434 that transportation cost and movement was absolutely free, no cost at all about it, would that condi-

tion tend to increase competition between such institutions as cement mills?

A. If conditions were competitive, it would.

Q. I am merely asking you if it would tend to increase it.

A. It would tend to locate all the mills in the districts that had an advantage in materials and in conditions of production. It would be a freightless world.

Q. That is right, as far as the cost is concerned.

A. And so they—the whole industry—assuming, as I think it is not unreasonable—

Q. Yes.

A. —that there is a difference in the advantage of locations for the technical production. All of the production would be in a certain limited district having these advantages.

Mr. Wooden: Your Honor—

Q. What advantages? Just advantages of cheaper production?

Trial Examiner Norwood: Wait a minute.

18435 Mr. Wooden: I don't object to the questions that are hypothetical and have some relation to the facts of this case, but the speculative question as to what would be the situation without any cost of transportation or transportation free, I don't get it.

Mr. Zimmerman: It may be he don't get it, but it is a serious question and—

Trial Examiner Norwood: I think Counsel is leading up to development of price.

The objection is overruled.

By Mr. Zimmerman:

Q. It would tend to put the competition between all producers upon the basis of the ability to produce the commodity out of the materials and machinery and labor they had right within their reach, wouldn't it?

A. Yes, it would localize production and where there would be competition among the units of the industry the various mills, that another very large question.

Q. You wouldn't have any cross-hauling waste, would you?

A. No.

Q. And all the prices would, in effect, be f.o.b. mill prices, then, wouldn't they?

A. Yes. They might or might not be. That would depend on whether there were competitive conditions.

Q. When you have no cost at all for the transportation, the prices would necessarily all be equivalent to
18436 f.o.b. mill prices, wouldn't they?

A. No. If the industry is controlled monopolistically, if there is a great merger that unites all of these mills in one—

Trial Examiner Norwood: Whether there is or not wouldn't the price at the mill be the same, be exactly the same as the price at the point of delivery?

The Witness: No. Monopoly prices may be—

Trial Examiner Norwood: Leave the monopoly out of it. You just have the condition of no freight.

The Witness: If you leave monopoly out of it it assumes the converse, that there is an effective condition of competition among the mills. It must be either the one or the other.

Trial Examiner Norwood: No assumption at all. Wouldn't the price at the point of origin be identical with the price—

The Witness: No; a monopoly might zone the country. It might make differences; it might make sectional preferences.

A monopolistic combination—

Trial Examiner Norwood: With regard to one particular transaction.

The Witness: Yes. It might make all sorts of
18437 discriminatory differences. If there was competition there, it couldn't.

By Mr. Zimmerman:

Q. Relieve your mind a little bit of these fears about monopoly. Assume—

A. I am not having fears about them.

Q. All right.

—that the mills remain in the hands of the approximately 75 owners that they now are in, and that there are no combinations whatsoever. Now, under those circumstances, would it not be so that the price at the mill and the price at any point of delivery would be exactly the same?

A. Yes. By assumption you have a perfectly freightless situation there.

18438 Q. Now, if you could produce that kind of a condition it would tend to solve a good many of the present ills as you find them in the industry, would it not?

A. Yes. That is such a fantastic supposition that—

Q. Let us see how fantastic it is when we get through. As it stands now, Doctor, under present conditions the market is the area over which competition extends in relation to transportation costs. That is to say, transportation costs now limit the area of competition, don't they?

A. Yes, and base points; combined with base points.

18441 Q. Dr. Fetter, do you agree with this statement, that under present conditions as the distance becomes greater, costs of transportation increase and competition becomes more limited?

A. Yes, by geographical graduations.

Q. Do you agree with this, that the normal effect of more efficient transportation on prices is to make them lower and to lessen the variations of the price of any particular commodity in different times and places?

A. Different places. Yes, different places. I do not quite see how times affects it.

Q. Do you agree with this, that the cost of movement enters into the price of all that has to be moved, and for this reason alone, without regarding more indirect results, prices fall with cheaper conveyance?

A. Yes. Of course, just directly—it is moving in the direction of your imaginary state there, the freightless situation.

Q. Well, do you agree with this, that in general, then, transportation makes for the free inter-action of industrial forces, which is the ideal of competitive society?

A. Transportation makes for that. That implies an improvement of transportation, does it not?

Q. Yes.

A. And improvement of transportation makes—

18442 Q. Freer interaction of industrial forces, which is the ideal of competitive society.

A. Yes. I think I would agree with that.

Q. Under the present system, where there are, literally speaking, billions of railroad rates, do you not think that there is a tendency to throttle competition by reason of the complication of transportation rates?

A. Yes, I do, indeed.

Q. So that under present conditions of transportation they really work toward inequalities among persons and deformity among their normal beneficence, do they not?

A. Yes. Yes, there are old-time inequalities, accidental, that have been continued, historical blunders, favoritism that has become more or less crystalized and political favoritism from time to time.

Q. Would it not appear to you as an economist that there is not necessarily an improvement of the economic welfare of the nation or an increase in the national dividend resultant from mere diminution in price in a commodity, however important such commodity may be, as an essential element of the health and comfort of the people.

The Witness: Let us see how that goes.

Mr. Zimmerman: Read the question.

Trial Examiner Norwood: Read the question.

(Last question read.)

18443 A. No, I cannot see why we should deny an advantage in lowering of price brought about naturally by increased efficiency in such an article as you describe.

By Mr. Zimmerman:

Q. Do you think that every diminution in price of such a commodity, then, is an improvement in the economic welfare of the nation?

A. Not a forced diminution; that is to say, an authoritative price-fixing diminution comes from favoritism or dictatorship.

Q. Suppose it comes from price wars?

A. I do not—I deplore price wars.

Q. Well, in that instance would you say that every diminution in price of such a commodity as I have suggested to you would amount to an increase in the national dividend or an improvement in the economic welfare?

A. No. There is the reason I tried to qualify it some, saying "brought about by increased efficiency," et cetera.

Q. Price wars, then, in your opinion, would have the contrary effect that you think would be beneficial?

A. Price wars are not the method that brings about the welfare of society.

Q. Let us take the other side of it. Could you say that every increase in price of such a commodity has a detrimental effect and results in a diminution of the national dividend?

A. No. It might be an article that was of such importance that an increase of price would be more
18444 than compensated.

Q. Well, do you recognize this as a truth: That there can be a point in price of a commodity that may reach a point of maximum of efficiency from the standpoint of the public interest and public welfare?

A. Yes. Doubtless there is that optimum point.

Q. Would it not be fair to say that this point is where the volume of exchange and consumption reaches a normal peak?

A. Yes, there is no objection to that phrase because—but the word "normal" is a very vague term.

18445 Q. Well, now, to be a little bit practical and factual about it: Take the period of 1930 to 1932 in an industry like cement, when the price went down and down.

It is a matter of common knowledge that in that industry as in many other industries the volume of sales—by that I mean the number of barrels sold and consumed—decreased as the price decreased, did it not?

18446 A. I believe so.

Q. Well, even in a normal period you can conceive, can you not, that price may go, as a result of price wars or forcing of some kind, so low in a commodity that they do, or might very naturally cease to produce it?

A. Yes; I think so.

Q. And offer it for sale?

A. Yes, I think so.

18449 "Q. Now, is there not, on the other hand, a point in price above which exchange and consumption will be retarded, or cease entirely?"

A. Yes—in any useful article, the last point of ceasing entirely would, of course, be a very extreme price.

By Mr. Zimmerman:

Q. Oh, yes, but where the tendency would be for volume in sales to decrease, when the price got up to a certain peak?

A. Yes, this is the same point that we discussed under the term "elasticity of demand."

Q. And it is the opposite of the one that we had a moment ago, about the low point in prices?

A. Elasticity of demand relates both to increase and decrease of price.

18450 Can it be said that there is necessarily an economic waste? By this I mean an injury to the interests of the public, in any group of people engaging in the production and exchange of any commodity, where as the result thereof such group of people gain a livelihood —keeping in mind, of course, that we are not dealing with items that are subversive of public morals or contrary to public policy of the nation.

A. Yes, there is an economic waste if people are prevented from pursuing honorable occupations.

By Mr. Zimmerman:

Q. Now, if by gaining a livelihood such a group of people in the course thereof are able to buy all the necessities of life and some of the luxuries, are they not to a very far-reaching extent contributing to the economic welfare of the nation?

A. Yes.

Q. And may they not be said to be increasing the 18451 national dividend?

A. Yes; every one honestly and effectively working is doing his part.

Q. And that is not applicable to any particular kind of a pursuit or a commodity so long as it does not involve something subversive of public morals or contrary to public policy; isn't that so?

A. Yes. Yes, I think it is all legal occupations.

Q. And it does not matter whether the commodity or enterprise involves a manufacturing, exchange, or sale of a tangible, as contrasted to an intangible, does it?

A. No, that is not essential.

Q. Now, the operation of a railroad may be said to be an intangible, so far as anything that you can see or touch or wave, and the services rendered in that item are what we might refer to as an intangible; is that not so?

A. Yes; perhaps you could call the service itself an intangible. It is a use, but the agents and instruments are exceedingly tangible.

Q. Now, with reference to this cross-hauling matter that you spoke of as a waste, by that you mean the amount of money that was paid out to railroad companies for freight service, where there was a hauling by one mill, which resulted from the sale by one mill over into the

territory where another mill had a freight advantage, and vice versa, did you not?

18452 A. You say "by that you meant." You mean the—

Q. The waste of cross-hauling.

A. The waste on the transportation?

Q. Yes.

A. Yes.

Q. Now, did you not at one time estimate that there was approximately 42 million dollars a year so expended in the cement industry alone?

A. No, I did not estimate that.

Q. No.

A. That was estimated by and given in a report on price bases, if I recall rightly.

18453 Q. Then you went on from there, did you not, and made this statement:

"Since it prevails—" and referring to cross-hauling, the statement was made, I take it, "—in dozens of other industries I would think it would not be an excessive guess, although that guess might be questioned, that there was an actual waste because of cross- hauling of around a billion dollars a year"?

A. Yes, I think I do.

Q. Now did you, at that time, find yourself in a position where you had made any factual study of your own to determine whether or not that was a correct statement?

18455 A. No. I made no factual study.

Q. Did you at the time you made that statement, Dr. Fetter—and I can give you the basis for the figure if you want to investigate it, or check it, and you made the statement, I believe, on the 9th of March, 1936, that: "For all class 1 railroads in the United States, excluding the switching and terminal companies, in the calendar year 1935—" the next year preceding your statement, "—the freight revenue or income was but a little over $2,790,000,000."

A. I had that in mind and I knew, also, that in

18456 the period of prosperity it had reached a figure of a full five billions.

Q. What year is that?

A. I am not sure whether it was '28 or '29; along about there.

18457 Q. But you did realize, then, and you did so state that if that item of income from cross-hauling

was eliminated that many thousands of railroad workers would be thrown out of work, did you not; as your opinion?

A. Yes. I think whenever there is any waste and you discover a way of reducing it or avoiding it you are likely to reduce employment.

18458 Q. Well, now, let us suppose that the industries wherein there is any cross-hauling were confined to selling only in that territory around their mills where they had price advantages over any other, there would still be a certain amount of unavoidable and inescapable cross-hauling around the edges of their territorities as the result of marginal competition, would there not, under present conditions of railroad pricing of hauling?

A. Yes, that is conceivable.

Q. Well now, would you think, as an economist, that if you could eliminate all but that much of the cross-hauling, this marginal cross-hauling, from all industries, and thus reduce the railroad income, that it would be for the public interest, for the Government to subsidize by payment to the railroads of the loss that they thus sustained?

A. That's a question of public policy.

18460 Doctor, do you think that the so-called waste of cross-hauling that you have referred to, amounts to a spreading of the cost of transportation over the entire price of the commodity?

A. That is the result now?

Q. Yes.

A. Yes, substantially, I think it is the whole practice that results in that, and the cross-haul—

Q. Now, if you do away with it, and cut down the 18462 railroads' income to the extent that you have—anywhere near the extent that you have estimated—you certainly could not continue to operate the railroads and pay all of their outstanding debts and the interest on their debts, could you?

A. No, they are not paid now, many of them.

Trial Examiner Norwood: I think that inasmuch as the Counsel has spent so much time leading up to it he might as well bring out the conclusion.

Mr. Zimmerman: All right.

18464 Q. Well, now, in any event, Doctor, will you not admit that this subject of cross-hauling, and the welfare—the national welfare—is such a complex subject that we cannot solve it without a considerable more factual study than we have been able to give it here so far?

A. Most certainly, and I think I ought not to have been asked to reply to a number of these very speculative questions—

Q. Well—

A. —but I have done it in the best of humor.

18466 If it were possible to work out a system of railroad tariffs, Dr. Fetter, that would make it possible for the shipper of a commodity like cement and all other commodities of a similar nature to ship it anywhere in the country, whether it was five miles or five hundred miles, at the same cost, that would bring you to a situation where you had freightless prices, wouldn't it; because all

18467 costs of transportation, no matter what the distance was, would be the same?

A. Even 10 yards?

Q. Yes.

A. Yes. That would be not freightless, but the postage stamp rate.

Q. Yes, but so far as the effect on pricing was concerned, the situation would be just the same as if you had no freight charges to be paid by anyone?

A. Yes. I have seen some publicity for something like that proposal in the last few weeks. It seems to me to be cockeyed.

Q. You haven't studied it very deeply, have you, Doctor?

A. This last proposal?

Q. The one I have just made to you, now.

A. No.

18468 I want to ask you, Doctor, have you ever at any time made any factual study that would enable you to determine the average length of cement freight hauls?

A. No.

Q. Or what percentage of cement is sold at any particular distance from various mills?

A. No, I haven't.

Q. Or the percentage or ratio of cross-hauling to all freight hauling in the industry?

A. I have some notion on that.

Q. I know, Doctor, but what I am talking about now is a real factual study.

A. No, I haven't; myself. I think it is a large enterprise which the industry has found, perhaps, difficult.

Q. Then you could not, under oath, at this time, give

us any definite statement as to the extent or the amount of cross-hauling in the industry, could you?

A. No, I think it would be far better to leave that to the record.

18470 Q. If you could carry heavy materials anywhere from 10 yards, that you have put it, up to 200 miles at exactly the same rate it would be possible to locate mills close to centers where there is a constant and considerably large demand for cement, would it not?

A. Yes. The location of industry, as I discussed I think with you yesterday, is the resultant and very good natural materials may be offset by distance, and vice versa. Close distance may make up for the deficiency of rather inferior materials.

18472 Q. Do you know enough about the cement industry as a matter of common knowledge, Dr. Fetter, to agree that the backbone of any company—I mean the backbone, economically speaking—engaged in the manufacture of cement is its dealer organization?

A. No, I do not.

Q. Would you think that were not true, from what you do know of the cement industry?

A. Yes, I would think that is not true because so much emphasis is made upon the necessity to have engaged in the manufacture of cement.

18478 Q. Suppose we were to assume this, Dr. Fetter: That there is a general practice in the cement industry of mills quoting prices upon and selling delivered cement at various destinations where there is a demand for it, either for re-sale or for fabrication, that is use in some manner, and assume that the mills, that some mills with considerable capacity, oh, mills that would aggregate production, we will say, average production that will run into several millions of barrels a year, have for eight or ten years past freely quoted and sold some of their cement not as delivered cement at a destination where it is to be used or offered for re-sale, but f.o.b. their mill, so they have followed the practice of quoting and selling f.o.b mill to Government agencies, cases where land-grant rates are involved, so that the Government can take advantage of land-grant rates by taking a delivery at the mill and shipping on Government bills-of-lading.

Now, assume that in this same industry there are, oh, approximately 75 different entities that own mills, and

that a very large percentage of them, running into eighty or up toward ninety percent of all those producing companies establish their own mill bases, and add to these mill bases the freight to the destinations at which they are quoting upon and selling delivered cement, and there are a small number of mills in the industry, or, say, producing companies, that do not habitually establish their own
18479 mill bases, so far as sales at destinations where they are selling delivered cement, but they are all just kind of price followers, follow the lead of some of the other mills, of which there is no means at the present time of compelling them to do anything else—what would you say as to whether or not the practices of pricing and marketing cement, as I have just now described to you, are substantially the same as the marketing method described to you in Mr. Wooden's hypothetical question No. 1, which appears on record page 17639?

18481 Trial Examiner Norwood: Did you want to amend that by saying "the same system of pricing"?

Mr. Zimmerman: That is what I mean, that is exactly what I mean.

18483 A. They are not substantially the same if and when the f.o.b. mill practice referred to in this question is in operation, because, then, there would be two systems in operation, and if the f.o.b. mill is a genuine f.o.b. mill, and not a counterfeit f.o.b., as is some-
18484 times understood by the term, it would materially change the operation of the basing-point practice in most territorities where the f.o.b. prices were in force.

18493 By Mr. Zimmerman:

Q. Dr. Fetter, from time to time you have used in your testimony, with reference to actions of the mills, the word "independently"; that is, with reference to their action in pricing and marketing their products.

Can you tell me what you mean by that term, please?

A. The ordinary meaning; acting as for himself.

18494 Q. Well, every price is the result of some kind of a formula, isn't it, for any product?

A. In a formula on which different competitors are acting at the same time.

Q. You mean that in all industries generally, or in any industry that you can think of—let us put it that way—can you think of any industry where prices are made

and sales made, generally, independent of any knowledge or information as to how competitors will probably arrive at the prices they will quote or sell at?

A. Oh, yes. I think that most competitors or all true competitors who are not conspiring or consulting have to make shrewd guesses as to what the bid of others will be; especially, of course, in sealed bids.

18495 Q. I am not asking you whether they are truly competing. I am asking you for an industry that follows the practice of selling its commodity independent of any knowledge or any information as to how competitors will probably arrive at the prices that they will sell at; if you know of any such.

A. I don't know of any industry that would make its own bid without assuming that its competitor would be trying to figure as close as he could in order to get the contract, but I think that in only comparatively few industries is there a calculation by a mathematical for-

18496 mula to arrive at identical delivered prices.

Q. Thus far you haven't been able to give us the name of any industry that operates on that basis?

A. I said the name of any industry supplying, let us say, boilers or heating plants.

Q. Can you cite the name of any concern in any such industry?

A. No, I don't personally know that. I happened to hear—

Q. Did you ever make any factual investigation of your own to determine whether it is true or not or is this just a guess?

A. It is a guess based on my experience, yes.

Q. Could you tell us any instance where meeting of a price, in your opinion, would be meeting competition?

Trial Examiner Norwood: Now I think we have gone into that.

Mr. Zimmerman: That question has not been asked.

18497 Trial Examiner Norwood: Not the identical question but we have gone into that subject.

Mr. Zimmerman: The question has never been asked.

Mr. Paulson: It seems to me it is the same question His Honor asked.

Mr. Zimmerman: It is not the same question. I am asking him, now, to give us an instance.

Trial Examiner Norwood: I am going to exclude that on my own motion.

Mr. Zimmerman: Of course I cannot very well conduct an examination with two counsel at the table over here and the Examiner making objections on his own motion. That is rather a difficult situation, and I think I am being prejudiced in this case by that kind of a situation.

18498 Q. Would it be proper to use that term for a market such as an industry like cement where there may be a very large demand in a certain locality for a few weeks or months and then practically no demand in that locality and a demand in another locality, so that the market varies as to locality and waxes and wanes in different localities?

Trial Examiner Norwood: Now you are coming back to the subject of markets and you have already cross-examined this witness—

Mr. Zimmerman: I have not examined this witness in one single particular on this point, sir. I have not asked him one single question on that.

Trial Examiner Norwood: I shall instruct him

18499 not to answer that question.

Mr. Zimmerman: Thank you. I am still being prejudiced.

By Mr. Zimmerman:

Q. Dr. Fetter, you stated in your testimony that you thought it economically desirable to prevent identical prices. If prices become identical in a perfectly natural competitive way is there then any economic evil involved?

A. You mean uniform in a local market?

Q. Well, I am not sure whether I do or not. I think that is a good start, yes, Dr. Fetter.

A. That is the usual principle laid down; as valid in a competitive market.

Q. There is, then, nothing essentially evil in the mere identity of prices in a certain marketing area, is there?

A. At a given place, but if you take an area where there are freights come in, then there would be as between two such truly competitive local markets, only a tangent point or tangent line at which the delivered prices would become identical.

18500 Q. I am talking about a marketing area, if you please.

A. No; if it is just at certain points. It might be consistent with competition at the various competing markets.

18503 Washington, D. C.,
March 30, 1939.

18509 *Cross-Examination by Mr. Zimmerman.*

Q. Dr. Fetter, assume a mill located somewhere in the west, west of the Mississippi, where the territory lying west of the mill is sparsely settled. You would, of course, recognize, that there are territories that are so sparsely settled that no matter what the price of cement was, even if it were 30 cents a barrel, it would not greatly increase the sale of cement in sparsely settled territories; that is, they would use only about a certain amount, any-

18510 way, at the outside. You understand that.

A. Well, whatever be the amount that it uses, it will use more if the price is lower.

Q. But there is a saturation point beyond which they don't ordinarily go unless you have got enough people?

A. There is no more saturation point in a sparsely settled area than in another area, as far as price is concerned.

Q. I am not talking about price, I am talking about amount sold.

For example, if you have a territory 50 miles square with only 10 people in it, there would be a limit of how much cement would be consumed by those 10 people even if you gave it away, wouldn't there?

A. Yes, and there would be if there were a million people.

Q. Quite so. We will go on with this hypothetical question.

We have got this territory lying west of the mill that is rather sparsely settled as compared to the territory lying east of the mill, and lying east of the mill there are two other cement mills located, so our first mill, or the two others, any one or all of them, may serve the territory lying between them from east to west or west to east.

Now this mill out here on the edge, this first mill that I spoke about, we will assume has an efficient, pro-

18511 ductive capacity of substantially a million barrels a year. A million barrels is about the amount that, when run through that mill, it operates at the most efficient cost and from some experience that mill has learned

that it can sell about so much as a million barrels a year and still average, if it averages a net return, of substantially $2 per barrel, it can make a sufficient profit to encourage it to keep going.

It is able to sell to the east through competing with the two other mills so that it can net only about $1.75 per barrel on about half its efficient productive capacity, or 500,000 barrels; finds that it can sell about 500,000 barrels to the west; runs over a considerable distance to the west where it has no competition there within 600 miles to the west of it.

There, because having no competition for some 600 miles to the west of it, it is able to sell so that it can average a net return of $2.25 a barrel on the balance of the 500,000 barrels which makes up its million barrels of efficient production.

Now, on that state of facts, what is your opinion as an economist if there is anything there which, as an economist, you would say is subversive of the public interest?

18512 A. Yes, I think that there is a monopolistic situation, and that that is being exploited with reference to that part of the area in which the monopolistic power is greater—

Q. And which part is that?

A. —and as regards the term "subversive," I think that is an extreme term.

Q. You think what?

A. I think the term "subversive" is rather an extreme term to apply, but we are concerned with the policy that will be on the whole, and in the long run, the best for the public interest, a thing may be not perhaps the very best and yet you could not be,—say, subversive in the sense of completely overthrowing. These are all matters of degree.

Q. Well, do you think there is anything in that situation which would, in your opinion, be so detrimental to the public interest that it would require change by any sort of governmental regulation, or regulation by any governmental power?

Mr. Wooden: Your Honor—

Trial Examiner Norwood: Yes.

Mr. Wooden: —I object to the question and to the line of questions.

I attempted to bring out on direct examination nothing of this sort from the Doctor. I did not raise any questions as to what individual mills might do. I was all the time concerned with what the industry did as a
18513 whole, and what the mills did in their various competitive relations, and not what some one mill is doing, like this question presents.

Mr. Zimmerman: We can only judge the hive by the behavior of each bee considered sometimes as an individual. We cannot very well assume making an assumption for every mill in the country, and include all of them in a single question. We have to proceed, rather, one step at a time.

Now, as to the weight or value or persuasive quality of the question and answer, that I shall not argue.

Trial Examiner Norwood: Read the question.

Mr. Wooden: It is all right to take the thing apart to show its various parts, but you have got to put it together again before you can consider, or not consider, the separate parts.

Mr. Zimmerman: I cannot do that all in one question.

Trial Examiner Norwood: Read the question, please.

(Last question read by Reporter.)

Trial Examiner Norwood: I think he may answer that. The objection is overruled.

A. Yes, there should be governmental regulation for whatever the public decides to be in the public interest; it may be, however, that no new legislation is necessary.

18514 By Mr. Zimmerman:

Q. But I am asking you not now what the public might decide, but for your opinion as an economist. We will go back to the preface, to the introduction to our examination, when I told you that my questions were calling for your opinion as an economist unless I warned you otherwise, so please give me your opinion as an economist.

Trial Examiner Norwood: I think he has answered your question.

Mr. Zimmerman: No, not as an economist. He said that he thought that it was a matter for the public to decide. I want to get his opinion.

The Witness: I answered "Yes."

Trial Examiner Norwood: I think he gave his opinion first.

Mr. Zimmerman: All right.

By Mr. Zimmerman:

Q. What is the condition in there which you, as an economist, believe is detrimental to the public interest?

A. It is a monopolistic situation where the individual is exploiting the monopoly, as far as he can.

Q. Where is the monopoly?

A. The sole seller at that location.

Q. Well, you mean it has a monopoly to the west of it, because there is no competition within 600 miles there?

18515 A. Yes.

Trial Examiner Norwood: That is the territory where he is getting two and a quarter net.

The Witness: Yes.

By Mr. Zimmerman:

Q. What is there wrong about that? That is merely a geographical location that they have decided to put the mill there, and they do it.

Now, what is economically wrong or subversive, or contrary to any proper relation of conduct that you can find in that?

A. It is economically wrong to have monopolistic situations exploited if it is possible to make the situation less monopolistic.

Q. Well, how could that be remedied as an economist?

A. Uniform base price would make the behavior of the mill resemble much more closely the situation in a competitive market.

Q. You think it is economically wrong for the mill to charge what the traffic will bear to the west of it, do you?

A. Yes, that is a monopolistic situation which it is exploiting.

Q. Well, now, isn't that exactly the situation that you would have if you circumscribed the territory in which each mill was permitted to sell to the territory in

18516 which it had a freight advantage over other mills, just as this mill has to the west of it, unless by some legislation, or something of that sort, you provided, you affixed, that its prices should be made in some specific manner?

A. No, I have already explained, at length, my view on this subject.

Q. All right.

Mr. Zimmerman: That is all. Thank you, Dr. Fetter.

Trial Examiner Norwood: Redirect?

*Redirect Examination by Mr. Wooden.*

Q. Dr. Fetter, in the last two or three questions you used the word "exploited." What did you mean by that,—exploiting this 600-mill territory to the west?

A. Well, that is one of the—I used it in one of the usual senses of the term "exploit," namely, taking full advantage, or as full advantage as possible of the situation.

Q. Was there any contrast in your mind between such exploitation in that territory and what the same mill would be doing with its customers in other territories?

Trial Examiner Norwood: I omitted to ask either one of Counsel if there was any further cross-examination desired? If so, let them state it.

Mr. Conaghan: No, Your Honor.

18517 The Witness: I just am not sure of the question.

Will you please read that?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Yes, the question called for a very definite confinement of the answer, I think, to that territory west.

By Mr. Wooden:

Q. But some previous questions talked about the territory to the east, did they not?

18518 A. Yes—the question attempted to put up a contrast and to define the attention in the answer, as I understood it, to the western territory, and the price in that territory.

Q. Was there any contrast in your mind between what the mill was doing in that western territory where it had a monopoly and what it was doing in other territories, when you used the word "exploit"?

A. Well, as I said, I was using the term with reference to the western territory.

It would be another question as to whether it had any

monopolistic power and was exploiting it with reference to any other territory.

Q. Would the word "exploit" have any application to a situation where a mill was accepting higher mill nets in one territory than in another?

A. Yes, that would be the case. Discrimination in price is the—if you wish to use that—term, the exploitation of a monopolistic power which enables the seller to discriminate between different buyers or classes of buyers.

Q. Do you draw any distinction, in your mind, between a market and a marketing area?

A. Yes.

Q. If so, what?

A. I think that matter has arisen in the course of my testimony and in my mind an organized market or
18519 a definite market is at a place at location where buyers and sellers assemble to make the transactions in public and with knowledge—of general knowledge on the part of both sides of the conditions, is to be distinguished, for clear thought, from the area from which they are attracted to that market and to which, in turn, they may take goods bought in that market.

Q. If I am not mistaken, Mr. Zimmerman asked you whether or not the identity of price in a marketing area was necessarily evil and I believe your answer was that "not at one or two places," or "not if the identity existed at one or two places."

Will you explain what you mean by any such answer that you may have given?

A. Well, what I evidently had in mind was this geographical margin of indifference.

There is, as between two completely competitive markets, a geographical margin of indifference at which point, a theoretically narrow point, there would be identical prices and, of course, if there is a blanketing of freight rates along that margin it would not be a theoretical line without breadth or thickness, but it would be a certain narrow zone within which the base prices of each mill taken in connection with the freight from that mill to that line or zone, would happen to be exactly identical.

18520 Q. When you referred to an automobile assembly plant as being a hybrid system with some characteristics of the mill base system and the basing-point

system, did you mean to imply that it represented an equal amount of the characteristics of each of those two systems?

A. Oh, no.

Q. You referred to parents, in that connection.

A. Well, we are dealing with a biologic analysis there; hybridization.

A hybrid, as I understand it in a biological sense, is not necessarily a half-breed; it may be a quarter; that is, one race, or one line of ancestry may be a quarter or an eighth or a sixteenth or a thirty-second. A hybrid is not a pure breed.

Q. Well, as applied to the automobile assembly plant, what kind of a hybrid is it?

A. It is a hybrid in which, far and away, the essential features really are the mill base. That is as I understand the situation as to the facts and I might be mistaken as to some details; the automobile sales policy is, we will say, Detroit, or Flint, or whatever it would be; uniform mill base price and anybody can go there and get delivery at the doors of the factory and drive it away, drive his car away, and he can buy at any point in Detroit plus freight and the dealers all pay that freight and you are
18521 quoted a price at the local dealers; so much, and it is a—

Trial Examiner Norwood: Doctor, don't tell us any more about the automobile business than is necessary to explain your previous answer.

A. (Continuing) Yes. Well, as I understand it, again subject to factual correction, the automobiles of any particular company like the Chrysler Company are sold at a uniform mill base price and the buyer can buy at the mill.

If he buys elsewhere he pays the price plus the freight.

Now, as regards this hybrid feature, it all lies within the business of the company itself, as I understand it.

There is not a quoting upon the mill base of some rival plant of automobiles. It is all within the company. It does not have the quality of mutual observance of somebody else's prices.

By Mr. Wooden:

Q. All right. If, as Mr. Zimmerman suggested, in a series of questions, cross-hauling of cement is equivalent to a tax spread over the whole price of cement, what is it that determines the amount of such tax, assuming that

competitive price, competitive conditions do not exist in the industry?

A. Well, it is determined by the effect of the
18522 practice on raising prices; base prices, above what they would otherwise be.

When you say a thing is equivalent you are speaking, in value terms, doesn't mean it is the same things as a tax because the tax—I think the term "tax", as rather usually applied, means something assessed by the Government.

Q. Is it ever used economically to apply to the prices that may be charged by a monopoly?

Mr. Leisure: What does that question mean? Does it mean in the cement industry or in his experience in business?

Mr. Wooden: In economics.

Trial Examiner Norwood: Generally, I think, he might establish that.

Mr. Leisure: Is it theory he is getting at, or as to facts? If you are testing his theory I have no objection to it, but he is not a factual witness and I want to know when and where and under what circumstances.

Mr. Wooden: Put in the word "economics."

Mr. Zimmerman: You mean "economic theory"?

Mr. Wooden: Yes.

By Mr. Wooden:

18523 Q. Is it ever used in an economic sense to be applied to the prices that may be charged by a monopoly?

Mr. Zimmerman: I still think that the question remains, to some extent, a factual inquiry.

If he means is it ever used in economic theory or expositions of such; writings of such, it would, of course, not be factual. If that is what it means, I shan't object.

Trial Examiner Norwood: The objection is overruled.

The Witness: Now I am to answer this last question?

Trial Examiner Norwood: Yes.

A. I think it is sometimes so used, but I think that, as I explained, it is a loose sense of analogy because usually, I think, and more exactly, we mean by a tax, something assessed by a Government.

18524 Q. All right.

Dr. Fetter, coming now to Mr. Zimmerman's illustration of the sale of horses: I believe that you testi-

fied that in the case of a single horse delivered at a certain point to the buyer that the total cost to the buyer was a hundred dollars, ninety-five of which went to the seller and five dollars went to Tom Jones for delivering the horse, Tom Jones not being the seller, or the seller's employee,—that the price was $95; is that correct?

A. I suppose I did.

Q. Would your answer be any different if you supposed, postulated, the sale and delivery of 20 horses to 20 different buyers under the same terms, in the same locality?

A. I think not. I was being asked there to tell how many angels can stand on the point of a needle, and I endeavored to set up a general criterion, but if the transportation had been taken care of as a past fact, had become a cost of the seller, the goods were brought to a place and there offered for sale, as was, of course, the universal practice in the medieval markets, and is the practice in our organized markets today, then the price would be the amount at which the title passes at that place; but if the delivery has not been completed, and arranged for, and remains still to be looked out for in some way, is not a completed fact, then I am inclined to say that the
18525 price for the transportation and for the commodity would be separately calculated.

That is the type of problem on which the Supreme Court divides five-four, or, rather, it is the type of problem which they refuse to decide because it is a moot question.

Q. Now, Dr. Fetter, in addition to the case calculated by Mr. Zimmerman of the hundred-dollar transaction, five of which went to a third party for delivering the horse, suppose you had a case where the seller sold the horse to a man in another town at a total consideration of $120, but had to pay a third party $30 for delivery—what would be the price of the horse in that case?

A. Who pays the price of delivery?

Q. The payment is made for delivery by the buyer, not by the seller?

A. Well, I think, applying my attempted criterion, I would say the transportation not having been provided for, but there were two payments there, one for the commodity and the other for the transportation which, as you said, was paid by the buyer.

Q. Well, assume it is $30,—what is the price for the horse?

A. The price remaining paid to the seller of the horse is $90.

18526 Q. Assuming that sellers always want to get the best price possible for what they sell, why wouldn't it be advantageous for the seller, in that case, to sell at $120 rather than a hundred dollars at the other place?

A. Well, obviously, it would be better on the principle of indifference, the seller in the market sells at uniform prices, and uniform prices in a market mean uniform net realized prices, and if he is getting $120 net realized at one place—

Q. No, I did not say $120 net realized.

A. Oh.

Q. I say, why wouldn't it be better to sell the horse delivered at $120, if that is the price, rather than sell it at a hundred dollars, if that is the price,—rather than ninety and ninety and ninety-five, respectively, net?

A. Well, it seems to me that that is obvious, that $120 is more desirable than $90.

Q. If he gets it, Doctor.

A. Yes.

Q. Does he get it when he pays $30 to a third party for delivering it?

A. No,—I certainly understood from your earlier question which I have answered that he got only $90.

Mr. Zimmerman: He raised the freight rate, Doctor—you do not get that.

By Mr. Wooden:

18527 Q. Do you see any similarity in the questions that I have just asked you, to what goes on in the cement industry as postulated in my long hypothetical question?

A. Yes. Of course there is a similarity when a delivered price, which is a compound price, is analyzed into the amount for the commodity and the amount for the transportation. There is a very close analogy there.

Q. You spoke something of phantom freight in connection with your answers to some of Mr. Zimmerman's questions.

18528 Q. Take the case first of the non-basing-point mill, to what extent is there a phantom freight

charge by such a mill under the basing-point system as described in my long hypothetical questioon?

A. "Phantom freight" is the term, rather popular term, used to indicate the extra freight, the extra amount equivalent to freight, that is received by a non-basing point mill from the point half way between itself and the next basing-point mill; so far as a non-basing-point mill is selling toward a basing-point mill it gets something more than the calculated freight from the basing point up to the point half way, freightwise, to the other mill.

That, I think, is simply descriptive.

By Mr. Wooden:

Q. Will you state whether or not, in your opinion, non-basing-point mills have any power that you would class as monopolistic in character, and, if so, what?

A. Well, yes.

Trial Examiner Norwood: Is that factual or—

18529 Mr. Wooden: How?

Trial Examiner Norwood: —with reference to your hypothetical condition?

Mr. Wooden: Oh, yes, I thought that was understood.

Mr. Zimmerman: Didn't have any hypothetical question describing all the non-basing-point mills, or did you, Mr. Wooden?

Mr. Wooden: Yes.

Mr. Zimmerman: Which one was it that described the non-basing-point mill?

Mr. Wooden: The long question, including both—

Mr. Zimmerman: Then this question refers back?—

Mr. Wooden: Yes, it refers back.

Mr. Zimmerman: —to the description in that question?

Mr. Wooden: Yes.

A. Yes, the non-basing-point mill is located at a distance from other mills, and it is not selling to all its nearby customers at a uniform price equal to the realized price that it gets at the geographical margin. It is

18530 getting this so-called phantom freight all inside that area, which is, of course, exploiting its monopolistic powers within that area, which it would not be doing to nearly as great an extent under the one-price system which would level out, take off this peak, or pyramid, of net realized price within those lines that I have indicated, by geographical margin.

18531 Q. Under the conditions posed in the long hypothetical question, in my long hypothetical question, do you regard the basing-point mills as having or exercising any power that you would class as monopolistic?

A. Yes; in the way in which I have just indicated in my last answer.

Q. Is there anything that you would regard as phantom freights in the case of basing point mills?

A. No. As I understand it, a basing-point mill does not have or obtain so-called phantom freight.

Trial Examiner Norwood: We will take a five minute recess.

(Whereupon a short recess was had.)

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Doctor, in your opinion, is there any relationship between the amount of cross-hauling and the amount of the base prices?

A. Yes; I imagine there might be.

Q. What is it?

A. Well, the higher the base prices the larger the number of people, of mills from a greater distance that can absorb freight without getting a net realized of nothing.

Q. Does that mean that as the base price increased, the amount of cross-hauling would tend to increase with it?

18532 A. I think that would depend more on sales effort.

Q. Other factors, of course, might off-set it, but treating those two factors in relation to each other and disregarding other factors that might off-set or destroy any tendency, what is the tendency?

A. Under the practice, or with the practice of identical delivered prices, raising the base price does not price a mill out of its sales because it can still match prices in every direction.

In other words, no matter how high a base mill may raise its price, it is simply moving in the direction of a non-basing-point mill and I think it has been mentioned in other connections if it gets its base price high enough it will cease to be a basing-point mill in fact, although it might still, nominally, have a base—

Trial Examiner Norwood: Would the increasing of a base price enable a mill to ship further away from the point of manufacture?

The Witness: The mill which increased its base price?

Trial Examiner Norwood: Yes.

The Witness: No; I don't see that that is the case.

By Mr. Wooden:

Q. I am not referring to any particular base
18533 price of any particular mill, but I am asking you what, if any, the relation is between the level of base prices at a number of mills and the amount of cross-hauling.

Mr. Leisure: If Your Honor pleases, now, I have been very patiently waiting for Counsel to finish this line of examination.

I thought perhaps he only had one or two questions and I wouldn't object.

It is not redirect examination at all, and it is not going into redirect questions with the Doctor.

Trial Examination Norwood: I think you went into that on the cross-examination.

Mr. Wooden: Decidedly.

Mr. Leisure: It seems to be decidedly factual.

Mr. Wooden: It is decidedly not factual.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Leisure: I submit that that is the kind of question he would be permitted to ask an industry witness on cross, perhaps, but this is not cross-examination, it is redirect; it is his own witness and I think we are spending time unnecessarily on it.

18534 Trial Examiner Norwood: No, the cross-examination went extensively into the effects of cross-hauling.

Mr. Leisure: Yes, but this is speculation as far as this witness is concerned, as to what is done in the industry.

Trial Examiner Norwood: No, no.

Mr. Leisure: And I think that he should—

Trial Examiner Norwood: No, he is asking his opinion as to the relation between the level of base prices and the extent of cross-hauling, whether or not the raising of the price would tend to increase the cross-hauling, and lowering the price would tend to reduce it.

He has a right to do that.

Mr. Leisure: I do not think that is the question, Your Honor,—

Trial Examiner Norwood: Yes, I think so.

Mr. Leisure: —as I understood it.

Mr. Wooden: Yes, that is the question.

Trial Examiner Norwood: The objection is overruled.

A. Well, as I see it, the higher the general level of base prices is the greater the opportunity for cross-hauling.

By Mr. Wooden:

Q. Well, if, as Mr. Zimmerman suggested, you wish to benefit the railroads, would you favor an increase in the base prices in order that the cross-hauling and ad-
18535 ditional freight to the railroad might redound to their benefit?

A. "No" would be my answer to this highly hypothetical question, because I would look upon cross-hauling in itself, necessarily, as an evil.

Q. Referring to your testimony on page 18427, lines 17 to 23, inclusive( handing paper to witness).

A. (Witness studies the paper.)

Q. I will ask you whether or not there is any confusion between your answers there, which you wish to correct?

Mr. Zimmerman: What page was that, please?

The Reporter: 18427.

Mr. Zimmerman: Thank you.

A. Well, I think it is evident that I misspoke there. The question related to the more distant dealer; the second or more distant dealer would have a price advantage, would be able to undersell near his mill. Now, evidently that is not—that is not what could have been meant. I mean near his warehouse, we will say, or lumberyard, and back toward the mill.

Mr. Leisure: Just a moment.

Counsel has underscored certain words there (referring to the paper in the hands of the witness.)

The Witness: Yes.

Mr. Leisure: I prefer to have the witness—

Mr. Wooden: No.

18536 Mr. Leisure: —if there is no objection, read a record that is not marked.

The Witness: That is all right; that is all right. I

see there is a confusion there. The word "mill," because the dealer hasn't any mill,—I did not mean to suggest that he had a mill; he has a—we will say—a lumber yard, or a builder's supply place, and I think that was the sense of the question.

By Mr. Wooden:

Q. What about lines 22 and 23?

A. "* * * and back towards the mill, as a result of that system of pricing.

"Q. And when you say 'undersell,' you mean undersell at delivered prices, don't you?

"A. Yes, at delivered prices, and also at base prices, if he is selling at a uniform mill price."

I suppose that should be at a uniform store price, or the yard price. It shifts to the word "mill" where it is a dealer place referred to.

I had not noticed that.

Q. Mr. Zimmerman asked you whether dealers in certain price zones,—whether the dealers in one zone had any advantage over other dealers.

18537 Q. In the price-zoning method of establishing dealer prices, will you state whether or not such a method involves withholding from any dealers some of their natural advantages of location?

18539 Trial Examiner Norwood: I think Counsel had better reframe the question.

Mr. Wooden: All right.

By Mr. Wooden:

Q. In cases where the delivered prices to dealers are the same at several different points and the freight to those different points varies, is there, in that situation, any withholding of the advantages of their location from some dealers?

Mr. Leisure: Now, that goes as to the advantage to dealers and that has nothing to do with the issues in this case, so far as we know.

We are now going into another subject which we would have to follow up and it would prolong this examination unnecessarily.

Trial Examiner Norwood: I think this is an explanation of what was brought out, there; or, it is an attempt to elicit an explanation.

The objection is overruled.

A. Well, manifestly, any change in the wholesale prices paid by dealers resulting from this absorption of freight to certain dealers as compared with others would change the advantages to those dealers in their sales, in
18540 turn, to retail customers.

That is obvious; I think it is not an abstruse theoretical matter, at all.

By Mr. Wooden:

Q. Referring to this matter of guarantee against a client, about which Mr. Zimmerman asked you.

As an economist, would you expect guarantee against a client to be widely used in an industry unless the prices in that industry were rigid and inflexible?

A. Oh, yes—as an economist, if you mean confining myself to general theoretical principles, I have no opinion on that.

Q. Well, as an economist, would you expect guarantee against a client to be used by an individual seller unless he had confidence that his competitors would not force him to reduce his price and make good on his guarantee?

Mr. Zimmerman: That is not an economical question, that is a psychological question.

If you asked him as a psychologist how he would expect human nature to react under certain conditions, if he were a psychologist and qualified as a psychologist, it would be proper, but this is not proper at all and I object to it.

Trial Examiner Norwood: Read that question.

(Question read.)

Mr. Wooden: And thus require him to make good
18541 on his guarantee.

Mr. Zimmerman: That just calls for an expression of the witness' opinion how human nature might react and in the light of the witness' whole attitude in this case—

Trial Examiner Norwood: Objection sustained. Did you finish?

Mr. Zimmerman: I am finished.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Mr. Zimmerman asked you, Dr. Fetter, to cite any support you might have for your belief that the New Jersey Highway Commission attempted to get f.o.b. mill prices on cement and failed.

You, I believe, were unable to give the answers to that question, at the time.

I will ask you whether you, in your study of the record of the old Cement Protective Association case encountered any such evidence?

Mr. Zimmerman: My question, I believe, was directed to the witness' first-hand knowledge, if any, that would support the positive statement that he made. He said he didn't have any.

I don't think he could have any now and by simply saying, since he has been on the stand his attention
18542 has been called to something he thinks he may have read somewhere; that would still be hearsay and I would object to the question on that account.

Trial Examiner Norwood: If he can refresh his memory about it, but not otherwise.

Mr. Zimmerman: Not as to what he may have read somewhere, but as to something that he—

Trial Examiner Norwood: Oh, no; as to the facts.

Can you do that?

The Witness: I cannot give the source of my impression which seems to—the truth of it doesn't seem to be questioned, but as to whether I had any actual, first-hand evidence; I didn't.

Mr. Zimmerman: I was making no admission of the truth of his speculation on that, at all, and I don't want him to get the idea I am now, because I am not.

Mr. Wooden: You asked him for the source of the statement; where he got it.

Mr. Zimmerman: I asked him what his knowledge on the subject was and that is what he would be entitled to give, if he has any knowledge, and he says he hasn't.

The Witness: I object to the statement I have no knowledge. A man has knowledge of countless things he
18543 has not personally investigated.

Trial Examiner Norwood: Does this question go to bringing out the basis of some statement this witness has made?

Mr. Wooden: Yes. He made a statement and Mr. Zimmerman asked him to give the basis for it.

Trial Examiner Norwood: And he couldn't give it?

Mr. Wooden: And he couldn't give it.

Trial Examiner Norwood: But he has now refreshed his recollection and he can state that basis now?

Mr. Wooden: I am prepared to refresh it.

Trial Examiner Norwood: Let him state it.

Mr. Zimmerman: Just a moment. I object to Counsel showing this witness anything at all and asking him to read, now, and say, now, if that would be the basis for his statement.

If there is something the witness knows, let us ask him. He has already said he didn't know.

It is not a question of recollection, it is a question of what he knows.

Trial Examiner Norwood: No, as I understand it you asked him the basis for it and he couldn't give it.

Mr. Zimmerman: I don't believe I did. I think I asked him what he knew that would justify his making that statement and I think he testified he did not recall and I
18544 think Dr. Fetter will tell you that.

Trial Examiner Norwood: Let us decide that before we go on.

Mr. Zimmerman: Mr. Wooden has the page of the record.

Mr. Wooden: No, I don't have it.

18545 Trial Examiner Norwood: Read the question.

(Last question read by Reporter as follows:

"Q. Mr. Zimmerman asked you, Dr. Fetter, to cite any support you might have for your belief that the New Jersey Highway Commission attempted to get f.o.b. mill prices on cement and failed. You, I believe, were unable to give the answer to that question at the time. I will ask you whether you in your study of the record of the old Cement Protective Association case encountered any such evidence?")

Trial Examiner Norwood: Oh, you asked him to look up a citation?

Mr. Zimmerman: That is exactly it.

Mr. Leisure: Exactly.

Trial Examiner Norwood: The objection is sustained.

By Mr. Wooden:

Q. Do you now have any more recollection than you had about the source of your information on which you stated that the New Jersey Highway Commission had made an attempt to get f.o.b. mill bids?

18546 A. Evidently the understanding of what information is is different in the mind of Counsel and myself.

By Mr. Wooden:

Q. Well, I have the record here,—after bringing it up,—Mr. Zimmerman's question:

"Q. But you couldn't point to the source of that recollection in any way, could you?

"A. No, I can't at the moment."

That is what this is all about.

Mr. Zimmerman: What page, Mr. Wooden?

Mr. Wooden: Pardon me, that is page 18252, and 18251 bears on it.

18547 By Mr. Wooden:

Q. Page 18251, Mr. Zimmerman asked:

"Q. Can you turn to any document or record anywhere at all that so states with reference to the New Jersey incident that you speak of as having occurred some years ago?

"A. No, I shall not attempt to act as a factual witness in this matter."

Mr. Zimmerman: All right,—so what?

Mr. Wooden: He could not turn to any such document. You asked him to do it. I am trying to help you out.

Mr. Zimmerman: I did not ask him to do it at all. I merely asked him if he could.

Trial Examiner Norwood: Yes.

The Witness: Is there a question?

Trial Examiner Norwood: Read the question.

Mr. Withrow: It was sustained.

Mr. Wooden: I just merely want to ask whether he has any present recollection, refreshed, or otherwise, as to any source of his statement regarding the New Jersey incident.

18548 A. My recollection is refreshed merely by this discussion. I have not looked up the record. I did read that record, large parts of it, probably all of the factual statements, and if it is there in the record I doubtless saw it.

By Mr. Wooden:

Q. You do not recall now whether it was there or not?

A. I would not attempt to say without consulting the record.

Q. No.

Mr. Zimmerman asked you some questions regarding the prices of cement, assumed prices of cement, at Chicago.

If I am not mistaken, I gather that your testimony was

that the price of cement in Chicago was the equivalent of the delivered price at Chicago,—is that correct?

A. I think so.

18549 By Mr. Wooden:

Q. Now, we will come back to some of Mr. Leisure's cross-examination, on page 17986 and 7,
18550 Mr. Leisure assumed a case of an eastern mill in the Lehigh Valley, and another mill at Osborn, Ohio, and asked you certain questions about it.

I am going to ask you to assume these facts:

That there are two mills located at Osborn, Ohio, instead of one; assume further that Osborn, Ohio, is not a basing point; assume that the Osborn mills are charging Osborn customers the equivalent of a base price of some other point such as Ironton, Ohio, plus the freight from that point to Osborn, and that the Osborn delivered price is, say, $2.13 a barrel; assume also that at about the same time the two Osborn mills are shipping cement to customers at other points such as Cincinnati, Toledo, Cleveland, Sandusky, Ohio, Ft. Wayne, Indianapolis, Richmond, and Terre Haute, Ind., Detroit, Mich., Louisville, Ky., and that the Osborn mills—the two Osborn mills—realize a mill net of from 33 cents to $1.13 a barrel less than they received from their Osborn customers at the same time,—and tell us whether, under those conditions, assumed conditions, the two mills at Osborn are competing in a real market.

A. I think not.

Q. Can you state why not?

A. They are not behaving as competitors would in intra-market competition. That is, if they are really competing, and acting independently they—and there is a surplus of
18551 production in those two mills, much larger than is necessary within a few miles of the mills, then that would be relatively a surplus area, and the principle of indifference, and the principle of uniform price in a market would lead to the successive bidding against each other, until their net realized price would fall,—causing the net realized price to fall, and as they wished to reach out—

Q. Net realized price where?

A. At Osborn. Their net realized price at Osborn to fall. If they were really competing mills, and the principle of one—of uniform price, competitive price, in a market, were operating, they would cease to net $2.13, would reduce their prices, and as they did that they would, so to speak,

annex more territory; that is, would attract customers, and the mill base price of these mills would fall so that, at each step, they would be selling without discrimination and reaching out and annexing territory.

18552 Q. Do you see anything in the situation that I have postulated, there, that involves the matter of what you referred to as phantom freight?

A. Yes, if they are, of course, non-basing-point mills, by the assumption, and they are, therefore, selling at the mill—at the base price of some other mill plus calculated freight from that mill, and they are doing this on sales from their own mills, directly at their mill door, so to speak.

Q. Under the conditions postulated at Osborne would you consider Osborne as being a real market with two-sided competition?

A. No, I cannot see that it is.

Q. Even potentially?

A. Oh, potentially would be if they began to behave differently.

Q. Would your answers be any different, Doctor, if instead of comparing the mill nets at Osborne you took towns like Dayton, Ohio, or Richmond, or Indianapolis, Indiana?

A. No, it would just be a matter of degree.

The net realized prices of a non-basing-point mill might be likened to a succession of terraces moving out from the mill; that is, the net realized prices would be at different levels in accordance with the amount of freight that it absorbed.

18553 Q. As an economist, considering the conditions that I have postulated there regarding Osborne, Ohio, mills, would you or would you not say that the law of supply and demand was operating there?

A. The term—I would say that it is not; that the term law of supply and demand is a general statement of description of what happens in a competitive market where an equilibrium price is brought about by successive biddings and offers of buyers and sellers.

Q. Mr. Leisure asked you if the existence of a high base price would not invite other mills into the territory of that high base price mill.

I will ask you whether or not, in your opinion, the fact that other mills do come into the territory governed by

that base price mill has any indication to you, as an economist, that the base price is higher?

A. I think, yes; I think I answered a few minutes ago saying that the higher the level of base prices throughout the country was, the more likely that different mills would be able to absorb freight and ship long distances, but when they come in they come in merely matching the price and, consequently, the local mill is assured, as long as the practice continues, that whatever base price it makes would, within the territory that that controls, not be reduced by even a fraction of a cent per barrel.

18554 Mr. Leisure: We have been over this whole thing on direct; almost the identical words the Doctor has just said have been expressed on direct examination.

Mr. Wooden: We have been over it on cross, too.

Mr. Leisure: That doesn't give you a right to do it the third time.

Trial Examiner Norwood. He may bring out the illustration, there, he did.

The Witness: I would be very glad if all this repetition could be prevented.

By Mr. Wooden:

Q. I think you testified on cross-examination, Doctor, that the seller gets all he can. Is that true under either competitive or non-competitive conditions?

A. Yes, but the surrounding conditions would determine how much he can get.

It is very different when active competitors are present, acting independently, from what it would be when they are not present.

Q. In other words, can he get more under non-competitive conditions than he can under competitive?

A. That is, I might say, axiomatic.

Q. In your judgment is it more important to have a number of sellers seeking to supply the buyers, or to have competition among them?

18555 A. Well, I think it is more important to have price competition than mere sales effort competition.

Q. As an economist, is there any relationship between price competition and sales competition? I mean—let me put it this way: If you have an increased amount of price competition does that tend to lessen the amount of sales competition that is necessary?

A. Yes. The motive to bring about sales is of a price character and not of a salesmanship art character.

By Mr. Wooden:

Q. You testified on cross in response to Mr. Leisure's examination that you would not expect an individual to depart from the basing-point system unless it were to his individual advantage.

I will ask you whether, in your opinion, the individual would be waiving any individual advantage by adhering to the system?

18556 A. I hesitate to answer that. It would require imagination of all of the different situations.

18557 Q. Dr. Fetter, on cross-examination you testified that uniformity of price was no evidence either of the existence of competition or of monopoly.

Did you intend that statement to have any application to identical delivered prices under the basing-point system?

18558 A. No, I think I was thinking, in that connection, of uniformity of price by a seller. It is possible to have both a uniform competitive price by a seller and a uniform monopoly price by a seller, but the discrimination being in the power of monopoly it is usually to the advantage of the monopolist to discriminate.

He will be able to classify customers, either geographically or by social class or quality of goods, and so forth, so as to make an aggregate net larger than if he didn't discriminate.

By Mr. Wooden:

Q. Dr. Fetter, where is the market, in an economic sense, if sellers will not quote and sell buyers unless they first know where each buyer wants to take the commodity?

18560 A. I think that the essence of the market is really no place.

Mr. Zimmerman: Yes.

A. (Resumed.) Everything that takes away from a gathering, a common knowledge, and free access, and so on, subtracts that much from the conception of a 18561 market, and, in this case, there is no free access, and no gathering, and, therefore, the essential characteristics of a market is lacking.

By Mr. Wooden:

Q. Where is the market, in the economic sense, if the amount realized by the seller varies according to where each buyer wants to take the commodity?

18562 A. Well, there is no market where the principle of uniform price in a market is in force.

18563 *Redirect Examination by Mr. Wooden (Continued).*

Q. Dr. Fetter, do you recall the question Mr. Leisure asked you with regard to the statement made by you before the Temporary National Economic Committee to the effect that you did not impugn the motives or doubt the sincerity of business men, and that if you were in their position you would look at as they do?

A. Yes, I recall.

Q. Did the statement as quoted to you by Mr. Leisure, was it a complete statement of what you said in that connection?

A. No, it did not seem to me to be complete.

Q. Did you take any steps to ascertain what the complete statement was?

A. I did. I had a clipping, newspaper report, that gave the verbatim statement, and Mr. Leisure asked me to identify two sentences, and I assented, separately, to each of the two "Yes," that I did remember saying that, and he did not, however, as I understand it, ask me regarding the intervening sentence which bound these two together.

18564 Q. I am handing you a printed record said to be a verbatim record, in the print, of the proceedings of the Temporary National Economic Committee of your testimony on March 7th. Can you find there the matter which I was asking you about?

A. Yes. I see here the sentence that was in the newspaper clipping of which I spoke.

It reads to this effect, after the first statement that I did not impugn the motives. I said: "And you and I and others, if we are put in their position, would look at it as they do."

Then this is followed by these words:

"But that is not my position, and, gentlemen, that is not your position when you come to consider this problem and its possible solution."

Q. What do you mean by that additional language that you quoted there?

A. Well, I think it is rather self-explanatory, the natural impulse of every man is too look at his own interest in the matter and a live public question has to be considered in a much broader light and the responsibilities of the Monopoly Committee which has to find, if possible, some solution, are very different from those of an industry, in the judgment of its own advantage.

Q. Do you recall Mr. Leisure questioning you about a statement made on page 33 of your book, "The Mas-
18565 querade of Monopoly," with regard to the Supreme Court's opinion in the Steel Dissolution case (handing book to witness)?

A. Yes, that was discussed at some length.

Q. Did his question, and the answer you made to it, then, give, in your opinion, what was an adequate fair showing of what you said in that connection in your book?

A. Well, I thought this expression was justified at the time, and I still think so.

Q. My question was, Doctor, whether the question of Mr. Leisure, and your answer to it, gave a complete, adequate, and fair presentation of what you said in your book in that connection?

A. In what connection?

Q. About the Supreme Court Dissolution suit.

Mr. Leisure: Now, I submit that the book speaks for itself as to whether it is complete or not. I do not think that anything that the Doctor can say now would change the book.

The Witness: Is there a question?

Trial Examiner Norwood: What was the question?

Mr. Leisure: Counsel is asking him to say whether or not there is something else,—if he has a different opinion now than he did before, as to the book; whereas, I was asking him whether he said certain things in the book.

18566 The Witness: Yes, that's it.

Trial Examiner Norwood: Yes.

Mr. Leisure: It does not seem to me there is anything that the Doctor can say now that will change what is in the book.

The Witness: No.

Mr. Leisure: The book speaks for itself as to what ever it is.

Trial Examiner Norwood: Well, the object of this entire cross-examination was to show mental bias to this attitude to the Court. Now, he can bring out further explanations to meet that cross-examination.

Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: Now, explain what you said in your book.

The Witness: I am afraid the question implies an error. This statement was made with reference to the Oil Decision.

By Mr. Wooden:

Q. Well—

A. Yes.

Q. —all right, I accept that correction.

A. Yes.

Now, of course, this statement alone does not rep-
18567 resent a complete picture of what is said in the book about the Supreme Court, because a good many other cases are discussed, and a good many other things are said with reference to the Supreme Court. So my answer is "No," this does not give a complete picture.

Trial Examiner Norwood: Do you think that those excerpts completely evidence your attitude to the Supreme Court?

The Witness: Oh, no, Your Honor, I think no two or three, or half a dozen, could. It would be necessary to read—you might say read the book as a whole, although I think that is asking a great deal from the patience of any reader.

Mr. Wooden: I am going to ask to have the book marked for identification.

Trial Examiner Norwood: That will be Commission's Exhibit 2921.

(The book entitled "The Masquerade of Monopoly," was marked for identification as Commission's Exhibit 2921.)

18568 Trial Examiner Norwood: What page was it that he had there?

Mr. Wooden: 33.

Trial Examiner Norwood: Was it 17814? Have you that, there?

I have a statement on that page, there; just a bare statement that the Supreme Court had reversed itself several

times, which sounds a little bit like I was criticizing; that I should have said more or less.

I didn't mean that any particular court had reversed itself and I would not like that to stand without some way reflecting the high regard I have for our Courts.

Mr. Zimmerman: Joining in that high regard I would not hesitate to be a party to it if you apply it to some recent decisions of the Supreme Court. They seem to have reversed themselves this year—not the same personnel, but the Supreme Court.

Trial Examiner Norwood: I have been raised to venerate our highest Court and I will never get over it. It is our grandest institution.

By Mr. Wooden:

Q. Dr. Fetter, is the book now marked Commission's Exhibit 2921, for identification, is that your book that has been referred to here as "The Masquerade of Monopoly"?

18569 A. It is.

Q. Referring to page 150 of the book. Mr. Lesiure called your attention to a statement there about the—I take it, the basing-point system failing to strike "the dim sight and the dull ears of the Courts." Was that a complete statement of what you said in that connection?

A. Well, the sentence reads: "The dim sight and dull ears of all the official investigators and the Courts."

Trial Examiner Norwood: Does that specify the Supreme Court?

The Witness: No; just in the plural—courts.

By Mr. Wooden:

Q. Now, Dr. Fetter, Mr. Leisure asked you to state your reasons for believing that the court was misled in the old Cement Protective Association case as you stated on page 237 of your book "The Masquerade of Monopoly".

Mr. Leisure: That was gone into on direct examination, but I don't recall having asked the Doctor that question, as Mr. Wooden puts it.

Mr. Wooden: Yes, you did.

Mr. MacIntyre: If Your Honor pleases, I think Mr. Wooden had attempted to ask a question on that score. It was objected to and the objection was sustained, but on cross-examination Mr. Leisure jumped all over the lot on that particular incident.

18570 Mr. Leisure: Regardless of Mr. Leisure's jumping, the facts are, I did not call the Doctor's attention to anything in the book. What I did was read a statement taken from his book and asked him if he wrote it.

That is not referring to the old case and it is not asking the question as Mr. Wooden puts it, at all.

Mr. Wooden: If you will bear with me I will find that in the record.

Trial Examiner Norwood: Read the question, in the meantime.

(Question read.)

Mr. Leisure: The quotation from page 237 which I referred to and asked the Doctor if he said it, was: "The main facts accounting for this judicial blindness seem to be the following:".

There is nothing about that that refers to the old case.

Mr. Wooden: Well, we will find it.

We will pass that until I get the page reference on it. I will not ask a question unless the record bears me out in my recollection.

18571 Q. Dr. Fetter, Mr. Leisure asked you if you knew any economic writers who had written in criticism of the basing-point system prior to the time you wrote your book on "The Masquerade of Monopoly." I believe your answer was you did not know of any. Is that correct?

A. Oh, yes, I mentioned—I mentioned John R. Commons.

Q. Yes, that is right.

A. And I mentioned also J. B. Clark's book, did I not, in that connection?

Q. I do not recall.

A. On the "Control of Trustee."

Q. I do not recall Clark, I do recall Commons.

A. Yes, J. B. Clark's book on the "Control of Trusts." I think I failed to mention that review article that has already been mentioned in the hearings, written by Professor Viner, published in 1925, which was a review of the book by Willis and Byers, in which Professor Viner criticized that book.

Q. Now, I want to ask you whether you know of any economic writers who have criticized the basing-point system since your book on "The Masquerade of Monopoly" was published?

Mr. Leisure: Now, if it is since the book "The Mas-

querade of Monopoly" was published, it cannot have any bearing on the views that I was questioning about in that book, and I, therefore, object to it; it has no bearing
18572 on the line of questioning that I was indulging in.

Trial Examiner Norwood: The objection is sustained.

Mr. Wooden: At page 17843 of the record, Mr. Leisure asked this question, referring to page 237 of the Doctor's book:

"Now, will you take your time, Doctor, and explain to us and to the Examiner fully for the record how the Court was misled there when you used that term 'judicial blindness'?"

Mr. Leisure: That is right.

Trial Examiner Norwood: Yes.

Mr. Wooden: And I want to ask the Doctor if he will not give at this time a full answer to that question. He demurred doing it at that time, and Mr. Leisure accepted his demurrer as satisfactory.

Mr. Leisure: Well, now—

Mr. MacFadden: Pardon r

This is a rather novel procedure to have cooperated with the witness in securing sufficient delay so that a suitable answer could be arrived at, and I object to the question. The question has already been answered.

Mr. Wooden: Mr. Leisure may have been satisfied with the answer, but I am not.

Mr. Leisure: I had to be.

18573 Mr. Zimmerman: What is the answer? May I see it?

(Mr. Zimmerman examines record in possession of Mr. Wooden.)

Mr. Wooden: Yes.

Trial Examiner Norwood: He can explain his answer, but I do not think he can give a different answer.

Mr. Zimmerman (Reading): "I don't think that I could undertake now to restate all of the steps by which I reached this view by very careful and prolonged study 10 years ago, or very nearly 10 years ago."

Mr. Leisure: I submit the question has been answered fully.

Trial Examiner Norwood: I think so.

Mr. Zimmerman: My objection to it would be it hasn't anything in the world to do with the issues in this case.

Mr. Wooden: Well, it was brought out.

Mr. Zimmerman: Well, I do not know how long we would be here if we followed the practice of going up every blind alley and by-path that happens to in some manner creep into the case. We never would be anywhere near the issues.

Trial Examiner Norwood: I think that inasmuch as this witness did not give any more complete answer than that, which would have enabled the cross-examiner to ask—

18574 Mr. Zimmerman: To follow it up.

Trial Examiner Norwood: —to ask other questions based upon it, that it would be unfair, unless we are going to open up new cross-examination, to permit him to give a different answer now.

Mr. Zimmerman: I think so.

Mr. Wooden: I would have no objection to any re-cross on it.

Trial Examiner Norwood: The objection is sustained.

By Mr. Wooden:

Q. Are the reasons for your statement fully set forth in the book, itself, Doctor?

A. I think so, yes, and I couldn't set them forth better.

18575 Q. Mr. Leisure was asking you something about a basing-point committee existing in the Federal Trade Commission.

Have you ever been a member of a basing-point committee, that you know of, in the Federal Trade Commission?

Mr. Leisure: Now I don't understand that there is anything new being brought out on redirect.

I asked the Doctor those specific questions. If Mr. Wooden goes into it now and brings out new matter it means I will have to go over it again.

I am sure the Doctor will recall I asked him as to whether or not he was ever a member of the committee.

He said he wouldn't consider he was, or some such answer.

Mr. Wooden: He was rather vague about it.

The Witness: Yes, and I hesitated and wasn't sure, at first, and I may have seemed to change my answer because I was groping for the truth.

I have discovered I was not a member, never have been, and never have been considered such, at all.

By Mr. Wooden:

Q. Mr. Leisure asked you, also, about your examination of the so-called brown and white book reports
18576 of the Commission.

I believe you said you looked over the reports after they were published?

A. Yes.

Q. Did you ever see, either before or after they were published, the basic material that was not published?

A. No, I have never seen any basic material, so far as I know, that was not published or even the basic material that was published, excepting, it might have been by accident, I saw something, a sheet, not knowing it was from that source.

Q. Mr. Leisure asked you, Dr. Fetter, your views on the subject of open announcement of prices. Do you believe that open announcement of prices is a good thing if it be a part of or coupled with some collaboration of competitors?

A. I can't recall just the connection in which that question came up, or just what I answered to it. I am rather unclear about that.

Q. Assuming that I have fairly epitomized your answer, what is your answer to my present question?
18579 Q. A good thing in the public interest?

A. This last question, Your Honor, says "if I have fairly epitomized your answer." I don't know what the epitomy is.

Trial Examiner Norwood: Just answer the previous question without regard to that last one.

The Witness: May I have it again? I think this is getting very confused.

The Reporter: "Q. Mr. Leisure asked you, Dr. Fetter, your views on the subject of open announcement of prices. Do you believe that open announcement of prices is a good thing in the public interest if it be a part of or coupled with some collaboration of competitors?"

A. No.

18583 C. O. OAKLEY, being called as a witness for Commission and, being first duly sworn, testified as follows:

*Direct Examination.*

By Mr. Wooden:

I am an associate professor of mathematics in Haverford College, Haverford, Pa. (18584.) I have been teaching mathematics for some fifteen years; I have an A.B. degree in electrical engineering, a Ph.D degree in mathematics, and an M.S. degree. I have taught in the University of Texas, Brown University, University of Illinois, and now at Haverford. I have had published articles on the subject mathematics in both the American journals and foreign journals. I am a member of the American Mathematic Association, and the Mathematical Society of America and I have read papers before these organizations. (18585.) I have studied and taught that part of mathematics that has to do with the subject of probability for "many years in the elementary work, and at other times in more advanced work."

18585 Q. Do you consider yourself qualified to answer simple questions relating to the theory of probability?

A. Yes, the elementary phases of it.

Q. Will you explain what are the most elementary phases or aspects of the subject?

A. Well, probability has to do with such problems with which most of us are familiar, as flipping coins, and throwing dice, and drawing cards from packs of cards. For example, we say that the probability of catching a head in one thousand times with a single coin is one-half, simply because there is one way of success and two ways of success and failure combined, and the ratio of the two gives the measure of probability.

18586 Q. Do you have any further illustrations that you might give, Professor Oakley, as to an elucidation of the elementary principle of the subject of probabilities?

18588 A. Yes. Innumerable questions—you might give the tossing of a coin that I have mentioned. Suppose you had a hat full of black and white balls, perhaps a hundred white balls, and one black ball, and I might ask what is the probability of drawing in a single draw the

one black ball. What is the probability of drawing an ace from a full pack of 52 cards. The answer would be four ways of success and fifty-two ways of success and failure; therefore, four divided by fifty-two, one-thirteenth.

By Mr. Wooden:

Q. What is the probability that two persons acting independently and without any collaboration between them would select the same twenty cards from a pack of fifty cards?

18589 Q. Now, Professor Oakley, is the following problem solvable by means of the mathematical theory of probabilities: Here it is:

Suppose that 16 competitors in sealed bids name identical delivered prices at a given destination, so that their delivered price bids match exactly; that is, quote identical delivered prices at that one destination. Now, if we assume that their bids are made without any prearrangement, collaboration, or understanding or agreement, what is the probability that the 16 bids will be identical at that one destination in terms of dollars and cents?

18590 Mr. Leisure: One moment, please.

I object to that question as incompetent, irrelevant and immaterial.

We are supposed to be dealing with facts in this case. I admit Mr. Wooden has sometimes gone very far in the field of fancy, but to go, now, from facts and deliberately stray into the field of probabilities, this case will never end. I object to going into this kind of question at this time.

The question, further, does not correctly summarize the record and does not correctly state any facts in the record so, as a hypothetical question, it is improper.

Mr. Wooden: It is a most conservative statement of what is in the record because I have confined it to one destination, Your Honor.

Mr. Leisure: It has not given the information that would be necessary in a hypothetical question of that kind.

Mr. Wooden: I am asking the witness if it is solvable in his judgment as an expert mathematician.

Mr. Zimmerman: Let us assume that the witness would say, as expected to say, that he would think, as an expert mathematician that there would be one chance—

18591 perhaps as much chance as catching a flea in a feather bed—it wouldn't have any bearing on the

issues in this case and the best you could make out of it is there is some reason to suspect something here. That doesn't mean a thing, so far as factual proof is concerned in this case.

Trial Examiner Norwood: It seems to me that that question is not based on the record.

Mr. Wooden: Your Honor, we have sixteen and more than sixteen bidders at many, many destinations bidding identical prices.

I have confined it to one destination of sixteen bidders.

Trial Examiner Norwood: You are asking him if he can solve a problem, here, with certain factors. You are asking him to solve a problem that is based entirely on the law of chance, as if there were no known conditions, no common factors as between the sixteen bidders and each factor would, of course, reduce the results tremendously.

The Commission is alleging that there are known factors here.

Now if this witness is prepared to take into consideration these known factors that are in evidence, here, where there is some evidence to support the fact that they
18592 are the known factors and what they are; can figure that out, I think he should be permitted to do it.

Mr. MacIntyre: If Your Honor please, of course what the Commission has alleged is the use of a system of bidding that would bring about identical bidding even though the bids were submitted under seal.

That allegation in the complaint has been unequivocally denied by the Respondents.

Now it seems one of two things must be met by those Respondents: They must admit that they have a system of known factors that are used in working out these bids, or that they do rely upon probability of getting identical bids under seal.

Mr. Wooden: It is challenged every time witnesses go on the witness stand as to whether or not there is a system.

Industry witnesses have claimed there is not a system, and I am simply seeking to apply the law of probabilities to test their contention.

Trial Examiner Norwood: You are seeking to eliminate one alternative. A result could happen in the presence of condition A and condition B and condition C.

The condition A, or chance, if you eliminate that,
18593 it narrows the investigation down to condition B and C. That is a known scientific method, but why shouldn't they be allowed to eliminate condition A?

By Mr. Wooden:

18596 Q. Is the following problem solvable, by means of the mathematical theory of probabilities; here
18597 it is:

Suppose that sixteen competitors in sealed bids name identical delivered prices at a given destination, so that their delivered price bids match exactly; that is, quote identical delivered prices at that one destination. Now, if we assume that their bids are made without any prearrangement, collaboration, or understanding or agreement, what is the probability that the sixteen bids will be identical at that one destination in terms of dollars and cents?

I am asking you whether that problem is solvable; that is all.

18598 Trial Examiner Norwood: He means that the bids come out identical.

Mr. Wooden: That is all I mean, Your Honor.

Trial Examiner Norwood: Answer the question as to whether or not that problem is solvable.

A. It is, Your Honor, with certain further hypotheses that I—

Trial Examiner Norwood: What are they?

Mr. Wooden: Let me put the further hypothesis.

Trial Examiner Norwood: All right.

By Mr. Wooden:

Q. Suppose you consider that you have a possible variation in the sixteen bids of only one cent. Does that meet the hypothesis that you say would need to be in the picture?

Mr. Zimmerman: What does he mean, a possible variation of only one cent?

Mr. Wooden: I mean instead of a range from one cent to fifty cents; suppose it is only a possible one cent
18599 variation; they are either identical or one cent variation.

18600 A. As I understand it, if the bids are to be either, say $1.78 and $1.79, and no other possibilities—

By Mr. Wooden:

Q. All right.

A. (Continuing) —there is a cent variation in between, so that one bidder of the sixteen may make $1.78 bid, another might make $1.78, another $1.79, and so on?

By Mr. Wooden:

Q. That is right.

A. Then, under those hypotheses, the probability could be determined.

Q. What is that probability, under the statement as I put it in my question?

18601 Trial Examiner Norwood: Does that solution take into consideration any known factors in pos-
18602 session of the various bidders; any known factor?

The Witness: No. As I understand the question, it would simply say to the mathematician, "Here is the problem." A person may either bid one bid or another bid.

I took $1.78 and $1.79 just as an illustration, and that there are no other factors that I know anything about.

Trial Examiner Norwood: In other words, you are treating these as if they were standing in the dark and were likely to bid anywhere from one to infinity?

The Witness: No, in this case either $1.78 or $1.79; only one of two, as I understood the question.

Mr. Wooden: Only a one-cent variation, as postulated in the question.

Trial Examiner Norwood: I know, but you are considering bidders who might possibly bid anywhere from one to infinity.

18603 Mr. Zimmerman: Not Mr. Wooden.

Mr. Wooden: I didn't put any basis price.

Trial Examiner Norwood: You set no limitation as to the possible bid.

Mr. Wooden: I did; one cent; either identical or non-identical by one cent.

Trial Examiner Norwood: No. You want his calculation to show the chances of their arriving within one cent of an identical figure somewhere.

Mr. Wooden: Either identical or non-identical by one cent.

Trial Examiner Norwood: But he has to calculate the possible bids from which he selects.

Mr. Leisure: That is right.

Mr. Wooden: No.

Trial Examiner Norwood: Their chances of arriving at the identical bids; am I correct in that statement (addressing the witness)?

The Witness: I am afraid not.

(This is a rather technical thing, I see.)

If you want a range of bids, as you say, from zero to infinity. A whole range of bids, so long as the range is finite, actually, the problem could be solved on such a basis, as well.

It would be much more difficult to give a quanti-
18604 tative answer, but a quantitative one could be given.

It simplifies the problem greatly to allow only two possibilities.

If you allow three or four or five or more, the complexity increases.

Trial Examiner Norwood: How many probabilities are you proposing to allow?

The Witness: As I understood the question, only two; the least number of variations possible; no other possibilities.

18605 A. So that would be the least variable case.

Mr. Paulson: Sixteen are either going to bid $1.78 or $1.79, and one of them is going to bid either one or the other.

The Witness: That is right.

Mr. Brick: The statement of the witness, Your Honor, confirms the view you expressed; that is, a selection of two does not conform with the facts of the question.

Trial Examiner Norwood: If you are assuming that here are some bidders that are bidding blind.

The Witness: Yes.

Mr. Wooden: Either bidding identical or non-identical, by difference of one cent.

Mr. Paulson: He has taken the most likely instance for identity to happen; namely, when there are only two different prices, he has taken the most likely instance, when by chance identical prices are apt to result. Now, he is asking the witness how often are they apt to be all identical in a situation.

Trial Examiner Norwood: You are assuming a market price there of $1.78, or $1.79.

Mr. Wooden: He did that for illustration. Doesn't

matter what you put it at. It is someone else or something different from it by one cent.

18606 Trial Examiner Norwood: You are postulating a known factor there.

Mr. Wooden: That is right.

Trial Examiner Norwood: Yes, he may do that.

Mr. McFadden: It seems to me it is asking for the solution of a problem in the answer without any background information, and in those circumstances even an economist couldn't express an opinion to a hypothetical question.

Trial Examiner Norwood: I think you can come a little nearer to the situation than—

Mr. Wooden: A mathematician can.

Trial Examiner Norwood: I shall overrule the objection and ask the witness to answer that question.

A. Well, if there are 16 bidders, each of whom is going to bid either one thing or another, the possibility—

Mr. McFadden: That is not the question.

Trial Examiner Norwood: You mean one figure or another,—you mean?

The Witness: Yes, that is one figure or another; that is to say either A is going to bid $1.78, or either $1.79, B is going to bid either $1.78 or $1.79, and so on down the line, for all sixteen.

Trial Examiner Norwood. Yes.

The Witness: Then the probability would be one-

18607 half to the fifteenth power, which is a pretty small—

By Mr. Wooden:

Q. Which is what?

A. Which is a pretty small affair, one-half to the fifteenth power.

Mr. Zimmerman: Well, that would be about equal to the number of railroad rates that are in the country.

The Witness: The denominator would be 1—the denominator would be two to the fifteenth power.

By Mr. Wooden:

Q. Two to the fifteenth power?

A. Two to the fifteenth power.

Q. With 16 bidders?

A. Yes, two to the fifteenth power, and I don't know what two to the fifteenth power is, offhand, but I could reduce it to decimals pretty quick.

Trial Examiner Norwood: Can you approximate it?

The Witness: Yes, that is about one in sixteen thousand.

Mr. McFadden: I move to strike the question and answer on the ground that it has been demonstrated to be incompetent, irrelevant, and immaterial, having nothing to do with the issues in this case.

Trial Examiner Norwood: The motion is denied.

By Mr. Wooden:

18608 Q. Can you give us some illustration, Professor Oakley, as to what that degree of probability would amount to in some terms that would be more easily understandable?

Q. First, however, you mentioned, I believe, 16,000 there, the figure. Are you sure of that figure, Professor?

A. No, I gave the correct answer, I think, in the first place, one-half to the fifteenth power, and that is a little comprehensible, as it stands, so I made an estimate of one in sixteen thousand, which proves to be too little, as a matter of fact. I computed it over the recess, I think it is correct, one divided by 32,768, to be precise (indicating at blackboard).

Q. Now, will you answer the question about an illustration of what that means?

18609 A. Well, it could be said in various ways, but the illustration could be given, I suppose one with the stars might be given, there are about 5,000 visible stars to the naked eye, all told, I mean—they have all been catalogued.

The Witness: So this probability figured one divided by 32,000, approximately, would be a figure less than—the figure representing the probability of picking out on a clear night a predetermined star, or pre-assigned star, picking out at random one star from the heavens—

18610 Q. What would be the probability if there were only ten bidders instead of sixteen?

Q. (Resumed) —and the other conditions remained the same?

A. Ten bidders instead of sixteen?

Q. Yes.

A. Well, the probable figures there would be one-half to the ninth power. I don't know what that is offhand. I have computed some powers of two—if I may be permitted to use them—

Q. You can refer to anything you like.

(Witness refers to paper.)

Trial Examiner Norwood: You mean where there are two bidders?

18611 The Witness: Where there are two possibilities, either one or another.

Trial Examiner Norwood: Go ahead.

The Witness: Two to the ninth power, would be 512, so the probability would be one in 512.

By Mr. Wooden:

Q. Can you illustrate what that order of probability would be?

A. Well, the simplest illustration there would be, I suppose, to take a hat filled with 512 balls, all white except one black, say, and you draw one ball at random; the probability of getting the one black ball would be one in 512.

Q. Now, assuming the same conditions, otherwise, what would the probability be for 16 bidders making identical bids at each of three destinations, instead of one?

A. May I ask, the same bid of $1.78 at station A and station B and station C?

Q. The only change is to use three destinations instead of one, use 16 bidders, and the possibility of them being identical and not identical, by one cent.

A. The probable figure would depend upon this—may I say again, are the bids at each of the three stations, or whatever you call them, the same, $1.78 and $1.78 and $1.78?

Q. Yes.

A. Or do they vary from station to station?

18612 Q. Assuming the same at three destinations,—or not the same.

A. Well, not the same would be the simplest thing for me, simpler to compute that way, 16 bidders at three stations.

Q. Yes.

A. The probability there would be one-half to the forty-fifth power.

Q. And what would that mean?

A. Well, one-half to the forty-fifth power, two to the forty-fifth power, about 10 to the thirteenth power, roughly, 3.5 times to the thirteenth.

(Witness figures at board.)

Well, the probability of the figure would be one-half to the forty-fifth power; that is equal to one divided by two to the forty-fifth power, and that is equal to one divided by—I think it is about 3.5 times ten to the thirteenth power.

Well, this is roughly, just approximately, equal to ten to the minus thirteenth power, to get the 3.5—ten to the thirteenth power—well, that is practically incomprehensible even to a mathematician, but there is some—oh, well, it would take, in round numbers, there is something like—well, say,—twelve power inches from here to the sun,—so if you laid half dollars down, side by side, from here to the sun,—it would be like picking out one of these half dollars at random.

18613 Q. So if you expressed it in figures, instead of the—forty or fifty power, whatever it was, you used, what would the figure be?

A. Well, I can only say that that would be this (witness figures at board)—I don't know offhand, but it would be something like this, it would be one divided by—how many—three (witness figuring at the board), six, nine, twelve, thirteen places, or one to about three and five, so there would be one, three, six, nine, twelve (witness illustrating at board), three, six, nine, twelve, thirteen—it would be one—I will have to stop and count, myself—in 35 trillions, roughly.

Q. What would be the probability if the conditions remained the same otherwise, and the only change were to take twenty destinations for sixteen bidders?

A. Twenty destinations?

Q. Yes.

A. And the destination prices are different?

Q. Yes.

A. That is essentially what I am giving here at the present time.

I could figure it out on another basis, but the twenty destination prices do not agree in any case.

Trial Examiner Norwood: That is as between destinations.

18614 The Witness: It would not make any difference. I can give it to you either way.

By Mr. Wooden:

Q. Perhaps you better give it to us both ways, stating clearly which way it is.

A. Well, if you have 16 bidders bidding identical prices at 20 destinations, by which I mean 16 identical prices at destination A, 16 identical prices at destination B, but this price differs from price at destination A, and so on down the road. Then the probable figure would be one-half to the fifteenth power (witness figuring at Board)—oh, mercy—one-half to the fifteenth power raised to the twentieth power, which is about one-half to the three hundredth power, I take it, and two to the three hundredth power—well, two to the three-hundredth power is about ten to the ninetieth power—ten to the ninetieth power, so this is on the order—these figures are—one divided by ten to the nintieth power (witness figuring at Board).

Q. Can you give us an illustration that will enable us to comprehend that?

A. Well, there are not that number of electrc in the universe, according to Edison, so this would be worse than picking out one electron from the whole universal system, as we know it.

Q. Well, suppose a question where six companies bid at 90 destinations, and the other conditions remain
18615 the same; what would be the order of probability?

A. Six companies at ninety destinations?

Q. Yes.

A. That would be one-half to the fifth power, all raised to the ninetieth power, what would be that—one-half to the 245th power?—I will have to stop and think.

Mr. Paulson: 450th.

Trial Examiner Norwood: 450th.

The Witness: One-half to the fifth power, raised to the—what was the number?

By Mr. Wooden:

Q. Ninety destinations.

A. Ninety?

Q. Six and ninety.

A. So the probability in this case would be one divided by two to the 450th power (indicating); and the 450th power of two is what—power of ten (witness figuring on board)—about one over ten to the 125th power.

Q. Is that larger than the illustration you gave to the previous question?

A. I imagine so.

Q. About the number of electrons?
A. Yes, much, much, much larger.
Mr. Withrow: That is almost infinite.
The Witness: Excuse me—the denominators are
18616 larger but the probable figure is smaller.

By Mr. Wooden:

Q. Yes.
Now, I have in mind a definite mathematical formula which I will not describe to you, but suppose that each and every one of 50 destinations in a certain area is taken to be an independent market where the normal forces of supply and demand operate,—what is the probability that prices of each of these 50 destinations would exactly fit the definite mathematical formula that I have in mind?
A. Well, either a particular price will fit the formula or it will not fit the formula. I would have to make—simplify the assumptions, Your Honor, about the equal likelihood, or the likelihood of such, and assume, for the simplest case, that it is equally likely that the price will fit the formula or not fit the formula.
Trial Examiner Norwood: That is in case of one single bid?
The Witness: Yes, a single bid.
Trial Examiner Norwood: Yes.
The Witness: I assume to be—I assume to be equally likely that it will fit the formula or not fit the formula.
Excuse me—and how many?

By Mr. Wooden:

18617 Q. Fifty destinations.
A. Fifty destinations. Well, then, the probability there would be one-half to the fiftieth power, one over two to the fiftieth power, is one over ten to the fifteenth power.
Q. Can the meaning of that be grasped from the illustration you have already given, or do you have any further illustrations that you might give?
A. Oh, no specially new illustrations. There are, I think—you could manufacture them—ten to the fifteenth power, there are not that many inches from here to the sun, or that many ten thousand; you could stack dimes on edge and probably this happening would be like the picking of one dime at random from a whole stack.
18624 The question of probability, I say again, involves the happening of some events, among a number of

events, happening or failing, and the question of equally likely always comes up.

I think I better stop, if you really want me to, and give you a better definition of probability.

If an event A can happen—capital A, shall I say—if an event capital A can happen in small "a" ways and fail to happen in small "b" ways, all ways of happening and failing equally likely, then the probability of such an event is A divided by "a" plus "b."

Now, then, in your question, unless I know that, a particular bidder, call him bidder No. 1, is equally likely to name one price, or another price, or another price, or another price, I cannot answer the question.

Q. Then, as I understand your explanation, Mr. Oakley, the real difficulty is that it would inevitably come out that they must bid identical, under the question that I put you?

A. Will you repeat that, please?

Q. That is the real difficulty?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: Is that right?

By Mr. Leisure:

Q. That is, they have no choice.

18625 A. Are you assuming that they have no choice?

Q. I mean that there is no element of chance involved,—it would come out that they would bid identically, as I understood your explanation.

A. No, not at all.

Q. Then, do you think the element of chance is involved, and that there is a chance that they would bid differently, and, if so, will you give us, mathematically, what that chance is?

A. Under the question as given, I do not know that chance is present, and unless chance is present there is no probability problem.

18627 Trial Examiner Norwood: I think on cross-examination he has a right to test the method of the expert.

Read it over, again.

The Reporter: "Now, assuming that bids were sought from, say, 100 manufacturers, and we will say they were located all over the country, and that each manufacturer is

free to bid, or not, as he chooses; and assume further, if you will, that each is free to bid any price he chooses; and will you also assume that each manufacturer is fear-
18628 ful that his past experience may influence his bidding, so each one of the 100 manufacturers turns the problem over to a person who knows nothing whatever about the business. Now, 100 completely ignorant men free to bid, or not, and free to bid any price whatever, take that problem,—can you tell us the probability of the following:

"A—of any bids being received."

A. By "received" you mean bids being made?

By Mr. Leisure:

Q. Yes.

A. There, again, the question of equal likelihood arises and as stated the problem is not solvable by the probability theory.

Q. Would your answer be the same as to B and C?

The Reporter: "B: Of 75 bids being received."

A. The answer is the same, in case B.

The Reporter: "C: And also 75 identical bids being received."

Q. Same answer?

A. No; slightly different.

Q. Let us have it in regard to the 75 in C, please.

A. If I may interpolate to this extent—you can say yes or no—that a hundred bills have been made.

Q. Seventy five were made. That was the figure.
18629 Trial Examiner Norwood. The probability of 75 bids being made.

A. Being identical?

Trial Examiner Norwood: No; I think it is the probability of 75—which is it?

By Mr. Leisure:

Q. It is the third one; 75 identical bids being received.

A. I say, my answer depends somewhat upon whether the remaining 25 were made, or not.

Q. No, the question is just as I put it; 75 out of 75 being received.

Mr. MacIntyre: If your Honor please—

Trial Examiner Norwood: Not being identical but being received at all.

Mr. MacIntyre: The witness has already answered that question.

We are now down to case C; 75 being received and identical. The question is as to what the application of the law of probabilities on them of being identical.

A. You mean only 75 have been received?

By Mr. Leisure:

Q. Yes.

A. Then, if you allow a complete variation, as I understood the question to indicate, they might bid or might not bid, in the first place, or might bid nothing whatsoever—there is an infinite variety of bids since there is an infinite variety of numbers.

Washington, D. C.,
March 31, 1939.

Mr. Wooden: Your Honor, in the hearings in Chicago, during December and January, I examined as witnesses Messrs. Bass and Royal, of the Commission's Investigating Staff, and during the course of their cross-examination demand was made by Respondents' Counsel for the privilege of inspecting the interview reports made by those witnesses covering their interviews with certain officials of certain Respondent companies, and which formed, in part, the basis for their testimony.

You will recall, however, Your Honor, that the witnesses did not have in their possession on the witness stand or in the hearing room the reports themselves, and did not refer to them for purposes of refreshing their recollection while on the witness stand.

I took the responsibility at that time of declining to present for the inspection of Respondents' Counsel the interview reports in question.

Your Honor sustained me in that position.

I wish to reiterate that I think I was wholly right in the position I then took, and your Honor was wholly right in the position he took, but I am now prepared to reverse the position I then took and to tender for the inspection of Respondents' Counsel the interview reports, which I have referred to for their inspection in the hearing room at such times as may be convenient.

After they have inspected such reports, I offer to produce those two witnesses for further cross-examination if Respondents' Counsel so desire.

I am now tendering, in line with my statement, the following interview reports for such inspection

Mr. Leisure: Mr. Wooden, before the tender, purely in the interest of saving time, would there not be some method that we could work out so that we could take them on receipt, so that we would not take up the time of the hearing while we inspect them? Otherwise, it would be nec-
18639 essary for us to take the time of every one while we read the papers and I do not see that that is necessary.

Trial Examiner Norwood: Well, I think he wants to describe them for the record and have them marked for identification, I suppose.

Mr. Wooden: I want to retain custody of them to the extent which I have indicated.

Trial Examiner Norwood: I see.

Mr. Wooden: It seems to me that—

Mr. Leisure: All right—you do not need to argue it, if you want to do it that way it is all right with me. I just thought it would be better the other way.

Mr. Wooden: The interview reports which I am tendering, as stated, are report of John H. Bass, of interview with L. T. Sunderland, of the Ash Grove Lime & Portland Cement Company, dated November 24, 1936.

Mr. Zimmerman: You might as well pass them along.

Trial Examiner Norwood: That may be marked for identification "Commission's Exhibit 2922—A to E," inclusive.

(The interview report above referred to was thereupon marked for identification as Commission's Exhibit 2922-A, 2922-B, 2922-C, 2922-D, and 2922-E.)

Mr. Wooden: Your Honor, I have no intention of offering these reports, so that I do not see why they
18640 need be marked.

Mr. Leisure: So that there will be no confusion, I believe they should be identified.

Trial Examiner Norwood: I think they should be identified.

Mr. Leisure: I think the Examiner is right about that.

Mr. Wooden: All right.

The interview report with John H. Bass, with Messrs.

P. A. Thompson and J. Berry King; representing the Oklahoma Portland Cement Company, dated October 12, 1936, and consisting of eight pages, to which is attached a memorandum of interrogatories and answers given by those men to Mr. Bass, consisting of four pages.

Trial Examiner Norwood: That may be marked for identification "Commission's Exhibit 2923-A to L," inclusive, for identification.

(The interview report above referred to was thereupon marked for identification as Commission's Exhibit 2923-A, 2923-B, 2923-C, 2923-D, 2923-E, 2923-F, 2923-G, 2923-H, 2923-I, 2923-J, and 2923-K.)

Mr. Wooden: The interview report by John H. Bass covering interview with F. E. Tyler, W. E. Tyler, R. W. Moore, and W. H. Gray, of the Dewey Portland Cement Company, dated November 16 and 23, 1936, consisting of 14 pages.

18641 Trial Examiner Norwood: That may be marked for identification as Commission's Exhibit 2924-A to N, inclusive.

The interview report above referred to was thereupon marked for identification as Commission's Exhibit 2924-A, 2924-B, 2924-C, 2924-D, 2924-E, 2924-F, 2924-G, 2924-H, 2924-I, 2924-J, 2924-K, 2924-L, 2924-M, and 2924-N.)

Mr. Wooden: Interview report of John H. Bass covering interview with Fred H. Rhodes and C. A. Brookes, of the Monarch Cement Company, dated November 17 and 21, 1936, and consisting of eight pages.

Trial Examiner Norwood: That may be marked for identification as Commission's Exhibit 2925-A to H, inclusive.

(The interview report above referred to was thereupon marked for identification as Commission's Exhibit 2925-A, 2925-B, 2925-C, 2925-D, 2925-E, 2925-F, 2925-G, 2925-H.)

Mr. Wooden: Interview report of John H. Bass with L. W. Rogers of the Consolidated Cement Corporation, dated November 18, 1936, and consisting of four pages.

18642 (Whereupon the document referred to was marked Commission's Exhibit Nos. 2926-A, 2926-B, 2926-C, and 2926-D, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with F. E. Tyler, president of the Dewey Portland Cement Company, dated October 28 and November 4, 1931, consisting of 7 pages.

(Whereupon the document referred to was marked Commission's Exhibit Nos. 2927-A to 2927-G, inclusive, for identification.)

Mr. Wooden: Interview report of I. D. Royal with L. J. Capen, vice-president of the Dewey Portland Cement Company, dated June 7, 1933, consisting of one page.

(Whereupon the document referred to was marked Commission's Exhibit No. 2928, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with L. J. Capen of the Dewey Portland Cement Company, dated November 18, 1936, consisting of 5 pages.

(The interview report above referred to was marked Commission's Exhibit 2929-A, 2929-B, 2929-C, 2929-D, and 2929-E, for identification.)

Mr. Wooden: The interview report of I. D. Royal
18643 covering interview with H. O. Warner, vice-president of the Colorado Portland Cement Company, dated August 28, September 3, and September 4, 1931, consisting of 3 pages.

(The interview report above referred to was marked Commission's Exhibit 2930-A, 2930-B, and 2930-C, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with Charles Boettcher, B-o-e-t-t-c-h-e-r, president of the Ideal Cement Company, and Colorado Portland Cement Company, dated August 26, and August 28, 1931, consisting of 4 pages.

(The interview report above referred to was marked Commission's Exhibit 2931-A, 2931-B, 2931-C, and 2931-D, for identification.)

Mr. Wooden: Interview report of I. D. Royal with C. B. Condon of the Hawkeye Portland Cement Company, dated November 16, 1936, and consisting of 9 pages.

(The interview report above referred to was marked Commission's Exhibit 2932-A, 2932-B, 2932-C, 2932-D, 2932-E, 2932-F, 2932-G, 2932-H, and 2932-I, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with C. B. Condon and C. A. Kasdorf,
18644 K-a-s-d-o-r-f, of the Hawkeye Portland Cement Company, under date of June 3, June 5, and June 22, 1933, consisting of 9 pages.

(The interview report above referred to was marked Commission's Exhibit 2933-A, 2933-B, 2933-C, 2933-D,

2933-E, 2933-F, 2933-G, 2933-H and 2933-I, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with C. B. Condon of the Hawkeye Portland Cement Company dated October 20, and October 21, 1931, consisting of 5 pages.

(The interview report above referred to was marked Commission's Exhibit 2934-A, 2934-B, 2934-C, 2934-D and 2934-E, for identification.)

Mr. Wooden: Interview report of I. D. Royal—this is a joint interview report of I. D. Royal and R. F. Milwee, covering interview with J. A. Rockwell of the Ashgrove Lime & Portland Cement Company, dated September 24 and September 25, 1931, consisting of 2 pages.

(The joint interview report above referred to was marked Commission's Exhibit 2935-A and 2935-B, for identification.)

18645 Mr. Wooden: Joint interview report by I. D. Royal and R. F. Milwee covering interview with L. T. Sunderland of the Ashgrove Lime & Portland Cement Company at the Omaha office of the Company under date of September 25, 1931, consisting of 2 pages.

(The joint interview report above referred to was marked Commission's Exhibit 2935-C and 2935-D, for identification.)

Mr. Wooden: In the same file, joint interview report of I. D. Royal and R. F. Milwee, covering interview with L. T. Sunderland under date of October 29, 1931, and comprising 5 pages.

(The joint interview report above referred to was marked Commission's Exhibit 2935-E, 2935-F, 2935-G, 2935-H and 2935-I, for identification.)

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record. That will be marked Commission's Exhibit 2935-A to I, for identification.

18646 Mr. Wooden: Interview report of I. D. Royal, covering interview with C. C. Merrill, vice-president of the Southwestern Portland Cement Company, at Los Angeles, dated January 27, 1932, comprising nine pages.

Trial Examiner Norwood: It may be marked for identification as Commission's Exhibit 2936-A to I, inclusive.

(The interview report above referred to was thereupon

marked for identification as Commission's Exhibit 2936-A, 2936-B, 2936-C, 2936-D, 2936-E, 2936-F, 2936-G, 2936-H and 2936-I.)

Mr. Wooden: There is an interview report of Mr. Milwee's in there that is strictly not called for.

Trial Examiner Norwood: Just do not number those succeeding pages after "I."

Mr. Wooden: Do not number them, that is all.

Interview report of I. D. Royal, covering interview with J. C. Van Doorn, sales manager of Universal-Atlas Company at Minneapolis, Minn., dated June 16, 1931, two pages, and in the same bound file a letter of I. D. Royal to H. L. Anderson, Chief Examiner, dated July 21, 1931, two pages, containing a report of information obtained from Universal-Atlas Company at Chicago, and in the same bound file a letter of I. D. Royal to H. L. Anderson, Chief Examiner, dated July 27, 1931, containing
18647 information obtained from F. L. Stone, and others, of the Universal-Atlas Company, comprising three pages, and in the same file a letter of I. D. Royal to H. L. Anderson, Chief Examiner, dated July 29, 1931, containing information obtained from the Universal-Atlas Company, and comprising two pages.

A letter of I. D. Royal in the same file to H. L. Anderson, Chief Examiner, dated August 8, 1931, containing some information obtained from Mr. Stone of the Universal-Atlas Company, one page, and in the same bound file a letter of F. L. Stone to Messrs. Royal and Milwee, dated August 6, 1931.

There are some other papers in the file which I do not think come within the demand made for inspection, but I will—

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibits 2937-A to L, inclusive.

(The documents above referred to were thereupon marked for identification as Commission's Exhibits 2937-A, 2937-B, 2937-C, 2937-D, 2937-E, 2937-F, 2937-G, 2937-H, 2937-I and 2937-L.)

Mr. Wooden: And interview report of I. D. Royal, covering interview with E. E. Duque, vice-president, and L. E. Bancroft, secretary-treasurer of the California
18648 Portland Cement Company, dated February 1, 1932, and consisting of three pages.

There is a letter in the file but while there is no objection to looking at it, it does not come within the terms of the demand, or of my compliance.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibits 2938-A to C, inclusive.

(The documents above referred to were thereupon marked for identification as Commission's Exhibit 2938-A, 2938-B and 2938-C.)

Mr. Wooden: And joint interview report by I. D. Royal and R. F. Milwee covering interview with G. A. Beckett, vice-president of the Riverside Cement Company, at Los Angeles, dated February 5, 1932, and consisting of nine pages.

Also a supplemental report consisting of one page, supplementing the interview report with Mr. Beckett.

There are a number of other papers in the file that do not come within the terms of what I am doing, but I will not remove them.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2939-A to J, inclusive.

(The documents above referred to were thereupon
18649 marked for identification as Commission's Exhibit 2939-A, 2939-B, 2939-C, 2939-D, 2939-E, 2939-F, 2939-G, 2939-H, 2939-I and 2939-J.)

Mr. Wooden: Interview report of I. D. Royal in the form of a memorandum to Mr. Dinen, who is in charge of the Chicago office of the Federal Trade Commission, but including some information obtained from Mr. Hjerpe, of the Consolidated Cement Corporation at Chicago. This comprises two pages.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2940-A and B.

(The document referred to was thereupon marked for identification as Commission's Exhibit 2940-A and 2940-B.)

Mr. Wooden: Interview report of I. D. Royal covering interview with Stanley G. Stewart, receiver for the Consolidated Cement Corporation, dated November 9, 1931, consisting of two pages.

Interview report of I. D. Royal in the same file covering interview with S. W. Storey, vice-president of the Consolidated Cement Corporation, Florida Portland Cement Company, and Signal Mountain Portland Cement

Company, dated August 6, 8, 12 and 13, 1931, and consisting of three pages.

There are some other papers in the file which I am
18650 not having numbered.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2941-A to E, inclusive.

(The documents above referred to were thereupon marked for identification as Commission's Exhibit 2941-A, 2941-B, 2941-C, 2941-D and 2941-E.)

18651 Mr. Wooden: Interview report of I. D. Royal with B. A. MacDonald and J. B. Cabanis, C-a-b-a-n-i-s, of the Northwestern States Portland Cement Company, dated November 19, 1936, consisting of 5 pages.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2942-A to E, inclusive.

(The interview report referred to was marked Commission's Exhibit 2942-A, 2942-B, 2942-C, 2942-D and 2942-E, for identification.)

Mr. Wooden: Interview report of I. D. Royal with Hanford Macnider, president of the Northwestern States Portland Cement Company, dated June 19, 1933, comprising 2 pages.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2943-A and 2943-B.

(The interview report above referred to was marked Commission's Exhibit 2943-A and 2943-B, for identification.)

Mr. Wooden: Interview report of I. D. Royal with B. A. MacDonald and J. B. Cabanis of the Northwestern States Portland Cement Company, dated May 26, 1933, and consisting of 7 pages.

Trial Examiner Norwood: They may be marked
18652 for identification as Commission's Exhibit 2944-A to G, inclusive.

(The interview report above referred to was marked Commission's Exhibit Nos. 2944-A to 2944-G, inclusive, for identification.)

Mr. Wooden: Joint report by I. D. Royal and R. F. Milwaukee covering interview with J. P. Cabanis of the Northwestern States Portland Cement Company, dated October 12, 1931, and consisting of 3 pages.

Trial Examiner Norwood: They may be marked for

identification as Commission's Exhibit 2945-A to C, inclusive.

(The joint report above referred to was marked Commission's Exhibit Nos. 2945-A, 2945-B and 2945-C, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with F. L. Stone, vice-president and general sales manager of the Universal-Atlas Company dated May 24 and 25, and June 12, 1933, and comprising 12 pages.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit 2946-A to L, inclusive.

(The interview report above referred to was marked Commission's Exhibit Nos. 2946-A to 2946-L, in-
18653 clusive, for identification.

Mr. Wooden: Report of I. D. Royal dated June 29, 1933, transmitting information furnished by O. N. Lindahl, L-i-n-d-a-h-l, auditor of the Universal Atlas Company, consisting of one page.

Trial Examiner Norwood: It may be marked for identification as Commission's Exhibit No. 2947.

(The report above referred to was marked Commission's Exhibit No. 2947, for identification.)

Mr. Wooden: Interview report of I. D. Royal covering interview with B. H. Rader, vice-president of the Lehigh Portland Cement Company under date of June 28 and June 29, 1933, and comprising 3 pages.

Trial Examiner Norwood: They may be marked for identification as Commission's Exhibit No. 2948-A to C, inclusive.

(The interview report above referred to was marked Commission's Exhibit Nos. 2948-A, 2948-B and 2948-C, for identification.)

Mr. Wooden: Your Honor, these reports which I have listed and described include all of the interview reports which Messrs. Bass and Royal consulted prior to giving their testimony and, in fact, include more than their
18654 testimony actually covered.

Mr. Zimmerman: They include those that one of them made notes from and concealed in his hand?

Mr. Wooden: I think so.

Mr. Zimmerman: All right.

Mr. Leisure: As I understand that, they do not, then, include all of the reports made—

Trial Examiner Norwood: I didn't understand that that witness concealed anything.

Mr. Wooden: No. I object to that characterization.

Mr. Zimmerman: He did. He had them even cut in a hexagonal shape so that they fit in his palm, this way (indicating), and it was not until he was almost through his testimony we discovered what he was doing.

Mr. Wooden: Just convenience for reference. Anybody could see he was consulting notes.

Mr. MacIntyre. If Your Honor please, I think Mr. Zimmerman's characterization of what occurred there is most unfair to the witness.

I think it is highly prejudicial and inflammatory to make such a statement and have it go on the record because it is not in accordance with the facts, and, in my
18655 opinion it was made for the purpose of prejudice and inflammatory, and I want to, with respect to Mr. Leisure's statement, make this reply to him: He asked if this comprised all the reports Bass and Royal wrote in connection with their cement investigation.

I can inform him they do not comprise all the reports they made in connection with the investigation of the cement industry.

They do comprise all the reports to which these men had reference before they testified in Chicago last December and January, and if Mr. Leisure would care for confirmation of that they will be produced to testify to that fact.

It is only the question of bringing them here, to put them on the stand, to satisfy that fact.

Mr. Wooden: I think by comparing the transcript of their testimony with the reports now tendered it will be found we have complied with every request, and then some.

Mr. Zimmerman: Well, that is very nice, but we will have to have, of course, an opportunity to have the record of those proceedings brought up here.

It is not at all the same as if they were produced at that time; the record of the proceedings at the time they were on the stand.

Trial Examiner Norwood: As I understand it the
18656 Counsel has offered to recall the witnesses for further examination.

Mr. Zimmerman: Yes, but it is not the same, at all, as if is is—as though they were on the stand.

Now we will have to get the record of the proceedings

so that we may have time to read them in connection with these documents.

We can't recall what the nature of the proceeding was.

Trial Examiner Norwood: Yes; you would have to do that.

Mr. MacIntyre: We have anticipated Mr. Zimmerman and Mr. Leisure would make such a suggestion and we have brought into the hearing room this morning the record of the testimony of those two men at the morning session in Chicago, Illinois, of December 13, 1938.

Mr. Brick: Are you going to offer the record in evidence?

Mr. MacIntyre: No, I am only showing what we are turning over to Mr. Zimmerman for his convenience.

Also the record of the afternoon of December 13, 1938. The morning session and afternoon session of December 14, at Chicago, Illinois; the hearing of December 16, morning session, Chicago, Illinois, which covers, of course, the Royal testimony.

18657 (The records heretofore described were placed on Mr. Zimmerman's table by Mr. Intyre.)

Mr. MacIntyre. The record for January 11, afternoon session, and the morning session of January 12, 1939, at Chicago, Illinois, covering the Bass testimony.

Trial Examiner Norwood: Could you give us the inclusive page numbers?

Mr. MacIntyre: They cover almost all of these sections of the record.

Trial Examiner Norwood: Give us the numbers on the front of the first one and back of the last one. Are they consecutive, there?

18658 Mr. MacIntyre: Yes, they are.

With respect to the Royal testimony, we have here for convenience of Counsel—

Trial Examiner Norwood: Well, I do not know that that is necessary at all; I do not think that is necessary.

Mr. MacIntyre: I think the identification of the record is clear that I have already given.

Mr. Leisure: I do not recall that our request included having Mr. MacIntyre turn us over any copies of the record.

What I am interested in, however, is knowing whether or not these reports constitute all of the reports made by Mr. Royal, Mr. Bass, and I understand from Mr.

Wooden that they do not. I do not recall his having referred to any long-hand reports here, and I do recollect that Mr. Bass testified concerning certain longhand reports that he had made, so that I think they should be included.

I would like to know, also, whether or not these are the reports from which the witness has testified, or are they some copies; in other words, are these the originals that were submitted by the witnesses at the time they made their reports to the Commission.

Mr. Wooden: These are the original signed reports. They include all of the reports covering interviews
18659 with the companies' officials about which they gave any testimony.

Mr. MacIntyre: If Your Honor please, with respect to the reference that Mr. Leisure made to longhand reports, and about which Mr. Bass and Mr. Royal testified at the Chicago hearings, I think it should be cleared with this observation, that they testified that at the time of their interview with these gentlemen they did make longhand notes which they used as a basis for their original signed reports.

Trial Examiner Norwood. Yes.

Mr. MacIntyre: And, of course, those longhand reports have many years since been discarded. They were not consulted by these men, but the original report, which was based on those, was consulted by them at the Chicago hearing.

Trial Examiner Norwood: Were the longhand reports ever filed?

Mr. MacIntyre: Never filed with the Commission, and were not present or consulted, so far as I know, at the Chicago hearings for either of those two.

Trial Examiner Norwood: Yes.

Mr. Leisure: My recollection is, and, of course, I may not be entirely correct, is that the witness testified that not all of these longhand reports were reduced to
18660 typewriting. Now, I take it that longhand reports not reduced to typewriting would surely not be discarded and thrown away.

Trial Examiner Norwood: I think you will find on investigation that it is the custom, or the usual practice, to destroy them; they are simply notes.

Mr. MacIntyre: Your Honor please, some of them may not have been reduced to typewritten notes, two or three

or four years ago; but if they were they were destroyed and were not referred to or consulted in any way by these two witnesses at any time during the progress of these hearings.

Trial Examiner Norwood: Well, any discussion as to them is rather futile, because these are the documents that the witnesses studied prior to their testifying, some days prior, as I understand it, and they are all, I think, that you have a right to see—in fact, I do not think you have a right to see them, you may only see them because Commission's Counsel is willing to let you see them.

Mr. Leisure: That is very kind; we apreciate it; but my recollection is that one of the witnesses testified as to having referred to longhand notes.

Trial Examiner Norwood: Well, the record will show.

Mr. Leisure: My recollection may not be correct
18661 as to that.

Trial Examiner Norwood: The record will show. Counsel may make any request he desires to make with regard to those.

Mr. Leisure: As I understand it—so that we may know as to what steps are being taken—as I understand it this offer to inspect is in compliance with our request to the Commission by letter which we made some time ago, so that we will know what our rights are in the situation.

Mr. Wooden: It is in compliance with the request made in Chicago.

Mr. Leisure: And it is not in compliance with our request to the Commission?

Mr. Wooden: I am doing this on my own responsibility.

Mr. Leisure: Well, all right, then, then I understand it. Now, of course, Your Honor, we cannot read that list instantly.

Trial Examiner Norwood: Yes; I understand.

Mr. Leisure: I will be guided by Your Honor's direction as to what we should do in the premises.

Trial Examiner Norwood: These are confidential files of the Commission, and they cannot well be passed
18662 around outside of the hearing room, as I understand it.

Mr. Leisure: Well, whatever Your Honor thinks is the most expeditious way of handling them, so that we can read them and compare them with the record, we will be glad to follow.

Trial Examiner Norwood: Is it permissible to have these photostated?

Mr. Wooden: Your Honor, I should say not.

18663 Mr. Wooden: With regard to these interview reports with regard to Messrs. Bass and Royal, which I have tendered for inspection in the hearing room, I do not wish to unduly crowd Respondents' Counsel in the inspection of those reports, but it does seem to me we have to have some kind of a definite understanding as to when they will be ready to say if they wish to recall Messrs. Bass and Royal for cross-examination.

Mr. Zimmerman: What is your suggestion as to what we do next?

18664 Mr. Wooden: My thought has been that some one of Counsel could be detailed to make the examination while we are going along with such other matters as we have before us today, which will probably not include an examination of witnesses but merely handling of documents and things of that kind.

Mr. Zimmerman: Unfortunately I have no assistant here.

Mr. Leisure: Mr. Zimmerman has no one to detail on that, and, furthermore, I don't know how we can possibly say we want to examine the witnesses until we have read the papers.

Trial Examiner Norwood: That is true.

Mr. Leisure: We can't make a statement in advance.

Mr. Wooden: If there is going to be so much uncertainty about it, and we don't know when you will get to the point of making a decision on the matter of asking the recall of those witnesses, I don't see anything left, Your Honor, much, except suspending the hearings until the papers tendered can be examined here and a decision reached.

Mr. Leisure: If they insist on our reading them here, that is the only sensible thing to do.

I had hoped that some plan could be worked out whereby we wouldn't take up everybody's time while we

18665 were reading these papers.

If the hearing could suspend and we could have time until Tuesday when we convene, then we could make our answers, and we wouldn't tie up the whole hearing, but if Counsel insists on his method of examining them at Counsel Table we have no choice except but to sit here.

Mr. Wooden: There are several reasons for my position. I do not feel authorized to allow the reports to go out of the room, and I do not feel warranted in allowing the decision on the matters to go to any indefinite length of time.

Mr. Leisure: Decision on what? What kind of a decision?

Mr. Wooden: The decision, after inspection, whether you want these men recalled.

Mr. Leisure: I am not asking for any time after we inspect them. I am merely asking for the opportunity to read them before saying whether we want to examine them or not.

Mr. Zimmerman: It is up to Mr. Wooden. I would like to know what he proposes to do.

Mr. Wooden: It seems, Your Honor, that there isn't anything feasible left to do except to make such suspensions as will enable these reports to be examined.

18666 Trial Examiner Norwood: I think we could go on today with a good many matters there that we may dispose of, and decide before adjournment what to do about the rest of them.

Mr. Leisure: I wonder if Mr. Wooden would be satisfied, if he wants to keep the originals in his own possession, to have them photostated, himself; not to have us photostat them but photostat them himself, and, in that way, he could give us the photostats and the originals would be in his possession.

Mr. Wooden: It is not that but a matter of policy of having copies of the reports made at all and in circulation and in possession of the parties outside of the Commissioners involved.

Mr. Leisure: We could give them receipts of the photostats and it would be just the same as reading them here or in our own office, as far as I can see.

Mr. Wooden: It seems to me, Your Honor, that we can go ahead with matters that don't involve the examination of witnesses; that is, these mere matters of handling of papers, without interfering with the inspection of these reports; particularly by Counsel representing the Institute, and others. There are several of them sitting at the table.

Trial Examiner Norwood: I do not see (refer-
18667 ring to exhibits marked for identification)—there are not so many of these but that they can be examined in an hour or so.

Mr. Zimmerman: No, Your Honor, there are two or three hundred pages here.

Mr. Leisure: I have to examine them, if Your Honor pleases, and I cannot examine them and sit here in the hearing, too.

Trial Examiner Norwood: I understand that.

Mr. Leisure: Mr. Wooden has made two suggestions, one of going ahead and the other of suspending. I do not know which he thinks is the best method.

Trial Examiner Norwood: My suggestion is we go ahead and we will decide about this other before we adjourn this afternoon.

Go ahead.

Off the record.

(There was a discussion off the record.)

18668 Trial Examiner Norwood: On the record.

I shall treat this exactly as I treated the papers produced here by the Respondent under the subpoena duces tecum, with the exception that the Counsel will give me their word that they will not be photostated or copied. I think we can handle that satisfactorily.

You can put that on the record.

Mr. Wooden: I am afraid that I did not get the full import of what Your Honor just said with regard to the interview reports.

Trial Examiner Norwood: Well, I shall, in the absence of serious objection, and possibly notwithstanding the objection, dispose of these papers—that is, handle these papers in the same way that I did the papers produced by the Respondents under the subpoena duces tecum, except that it will be the understanding, and if Counsel will give me their word, that they will not be photostated.

That is the reason that they are confidential, from the confidential files of the Commission.

18669 Mr. Wooden: Well, Your Honor, I do make serious objection, and stand upon the terms of the tender which I made, which was to the effect that these be examined, inspected in the hearing room.

Trial Examiner Norwood: If you are going to make any conditions, do not give them to me.

Mr. Wooden: Well—

Trial Examiner Norwood: Because if you are going to give them to me, I want to be responsible and see that Counsel have an opportunity to examine them.

Mr. Wooden: Well, I tender them for inspection by Respondents' Counsel.

Trial Examiner Norwood: Well, give them to the Respondents, then.

Mr. Wooden: And they are here now for that purpose (handing documents under discussion to Mr. Leisure).

Trial Examiner Norwood: Have you anything else to take up before the noon recess;

Mr. Wooden: I suggest, Your Honor, that we continue the session for the purpose of having these reports examined in the hearing room.

Trial Examiner Norwood: We will recess then until two o'clock..

Mr. MacIntyre: Not recess, that is exactly what
18670 they want.

Mr. Wooden: My thought was, Your Honor, and what I stated, that we continue the session for the purpose of having them examine the papers, and now as to suggesting who remains in the room at that time, I do not know that it makes a great deal of difference.

Mr. Leisure: Now, I want to say for the record that I do not understand all these conditional tenders are at all in compliance with our request to the Commission.

I think that we should have a full and fair opportunity to look at these and compare them with the record and decide whether or not we want to ask any questions.

Trial Examiner Norwood: You will have time from now until two o'clock.

Mr. Leisure: I do not think Counsel is doing that.

Trial Examiner Norwood: You will have from now until two o'clock to look at those.

Mr. Leisure: No, I have not. I have got to eat luncheon in order that I may be able to work tomorrow.

Trial Examiner Norwood: Yes.

Mr. Leisure: And I am going to eat luncheon,
18671 and I think I should have, with a mass of papers there, three or four hundred pages, and I do not

think I exaggerate it—should have a proper time to look at them.

Trial Examiner Norwood: I suggest that Counsel proceed to examine the papers and then the hearing will not recess until time for the luncheon hour, and we will reconvene at the proper time, and Counsel may continue to examine the papers.

Mr. Zimmerman: Well, the first thing that we will have to do will be to examine the record. There is no sense in trying to do anything until we start going through the record. That is what we will have to do first. I do not know how many hundred pages there are of the record to be examined. After that is done then we can either do—we can look at the papers.

Mr. MacIntyre: If Your Honor please, the record was tendered to Mr. Zimmerman some hour or two hours ago for the purpose of his examination if he so desired.

Mr. Zimmerman: That would have been a quarter of ten, would it not?

Trial Examiner Norwood: Yes.

Mr. Paulson: I hope that Your Honor's last ruling will be made to stand; I think it is right.

Mr. Zimmerman: You were not even here, then, Mr. MacIntyre.

18672 Trial Examiner Norwood: What was that, Mr. Paulson?

Mr. Paulson: I say, I hope that Your Honor's last ruling will be made to stand; I think it is right that they should sit here and read until they are tired, until they have had ample opportunity to read it.

Trial Examiner Norwood: They will be given ample time.

Mr. Paulson: They should have it. Anything else taken out of the court is a privilege which they wouldn't have had then had they been proffered to them there,—they shouldn't have it now. Let them sit here and read it until they have had ample time to read it, if it takes all afternoon, or—

Mr. Leisure: As Mr. Zimmerman has pointed out, Your Honor pleases—

Trial Examiner Norwood: You shall have opportunity to read these if it takes a week. You may stay here and read them.

(Counsel for Respondents examine exhibits marked for

identification as Commission's Exhibits 2922 to 2948-C, both inclusive.)

Trial Examiner Norwood: The hearing will recess until 2 o'clock p. m.

(Whereupon, at 12:02 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

18673 Afternoon Session. 2 P. M.

Trial Examiner Norwood: The hearing will come to order.

Counsel may proceed to the examination of the tendered papers.

Go ahead.

Mr. Leisure: If Your Honor please, I have a suggestion to make—

Trial Examiner Norwood: Proceed.

Mr. Leisure: Which I think might save some time. As we are reading now, we are reading the record in conjunction with the minutes. I do no know whether Mr. Wooden is prepared to go on, but if he were prepared to go on this afternoon, so that we could spend the intervening time until we convene Tuesday reading the papers, then all we would have to do would be to read the reports. It would cut the time in half, and we can do that over the week end.

I am merely thinking of the actual time consumed. I do not know whether that would be acceptable or not, but it is just a suggestion that it would save time.

Mr. Wooden: If you will take up, then, the first thing, and go ahead with the inspection of the interview reports at the next session, I think that is all right.

Mr. Leisure: That is what I suggested.

18674 Mr. Wooden: I doubted if you could get through with them today, and I was not insisting that you get through with the inspection today. I had no thought of it.

Mr. Leisure: You see, unless we had read the record first we would have to read them as we go along. If we can read the record outside of the court, and then go ahead with these, I think we would save time for every one.

Trial Examiner Norwood: Yes.

Mr. Leisure: And that being my suggestion, may I make one off the record.

H. P. BICKLER, being called as a witness for Commission and, being first duly sworn, testified as follows:

*Direct Examination by Mr. MacIntyre.*

18675 I am a court reporter. It will be thirty two years the 7th of April that I have been so engaged. At the present time I am engaged in reporting the case of the State of Texas against the Lone Star Cement Corporation, the Southwestern Portland Cement Company, Trinity Portland Cement Company and the Universal Atlas Cement Company. The hearing in that case is pending before a special commission. I am the chief reporter in that case and with the other reporters that have assisted me, we have been getting out what we call a daily transcript.

Q. Do you make certified transcript of the pro-
18676 ceedings to the State of Texas; that is, to the court, for this commission who is holding these hearings,—do you?

A. Yes, sir; the one copy will be known as the filed copy to be filed in the District Court under our practice.

Q. And you certify that copy to be a correct and accurate record of the proceedings had before this commission, do you?

A. That will be certified to by the Special Commissioner.

Q. But you are certifying to the Commissioner your report of the case?

A. Not written certification; I am sworn to report the testimony and make a transcript of it.

Q. And you followed that through your work,—that is, of the record reporting?

A. Yes, it is upon my skill and ability.

Q. During the course of those proceedings have representatives of the defendants in that case appeared and testified?

A. Yes, sir; we have had a number of hearings, and the different witnesses have been called by the several companies.

Q. You mean officials of the various companies?

A. Yes.

Q. Have those witnesses in cases, heretofore—I mean,

in instances where they have been called—looked over the transcript and sent portions of that transcript of their testimony to you with notations as to whether or not it was or was not correct?

18677 A. Yes, sir; practically all of them have, and they have not sent it to me, but I in person, went to them, and after they had read the testimony made some corrections.

Q. And they, of course, agreed it was what they had testified to at the proceedings?

A. And signed it. That was under an agreement of Counsel for both parties, and the Commissioner, that I might remain in Los Angeles and receive the signatures of those witnesses there, and I did stay several days after the hearing had been concluded; and in New York the testimony was corrected and signed by one of the witnesses there.

(Thereupon, a paper was marked for identification as Commission's Exhibit 2949-A, 2949-B, 2949-C, 2949-D, 2949-E, 2949-F, 2949-G, and 2949-H.)

By Mr. MacIntyre:

Q. Now, Mr. Bickler, I show you documents which have been marked for identification in this case as Commission's Exhibits 2949-A to H, inclusive, and ask you to state whether or not you recognize those documents, and, if so, as what?

A. Yes, sir; I recognize them as portions of testimony from our hearing.

Q. Whose testimony?

A. Well, the particular one I have in hand now is the testimony of Mr. Frank H. Powell, president of the Southwestern Portland Cement Company.

18678 Q. Where was that testimony given?

A. This testimony was given in Los Angeles.

Q. About what time?

Q. Now, will you tell us about when Mr. Powell testified in that case,—I believe you said—

A. The hearing at Los Angeles began on January 30th, and extended through February 6th, and I am not positive just what date Mr. Powell took the stand.

Q. But it was during that period?

A. It was during that period.

Q. All right. Thank you.

18679 And this document for identification, Commission's Exhibit 2949-A to H, is accurate and correct, as far as it goes, in recording his testimony?

Mr. Zimmerman: Well—

Trial Examiner Norwood: Wait a moment.

Mr. MacIntyre: I am asking if I have correctly understood his testimony to be to that effect.

Mr. Zimmerman: You mean that he took the transcript and then transcribed this?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. Zimmerman: I think we would be entitled to know whether he transcribed this, or whether he knows of his own knowledge.

Trial Examiner Norwood: I think we have gone far enough on that line. Let him answer.

By Mr. MacIntyre:

Q. Can you state whether or not, Mr. Bickler, Mr. Powell has agreed that that is a correct report of his testimony at that hearing?

A. Yes, sir.

(Thereupon, papers were marked for identification as Commission's Exhibits 2950-A to 2950-N, inclusive, 2951-A to 2951-QQ, inclusive, 2952-A to 2952-BB, inclusive, and 2953-A to 2953-U, inclusive.)

18680 By Mr. MacIntyre:

Q. Mr. Bickler, I now hand you documents which have been marked for identification as Commission's Exhibits 2950-A to N, 2951-A to QQ, 2952-A to BB, and 2953-A to U, and ask you to state, if you can, what they are (handing documents to witness).

Mr. Leisure: Was that 2950, 51, 52, and 53?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: Yes.

A. These are portions of the testimony of Mr. William R. Blair, of the Southwestern Portland Cement Company. Mr. Blair lives at El Paso. He gave his testimony in the course of the hearing at Los Angeles. He appeared on the stand for several days. These are portions of his testimony from different days.

By Mr. MacIntyre:

Q. Is this correct, in so far as it goes, of the record of Mr. Blair's testimony, Mr. Bickler?

A. Yes, sir.

(Thereupon, a paper was marked for identification as Commission's Exhibit 2954-A to 2954-K, both inclusive.)

By Mr. MacIntyre:

Q. Mr. Bickler, I now show you documents marked for identification as Commission's Exhibits 2954-A to K,
18681 inclusive, and ask you to state if you can what they are (handing documents to witness)?

A. These are excerpts from the testimony of Mr. C. C. Merrill, vice-president and general manager of the Southwestern Portland Cement Company, given at the hearing in Los Angeles.

Q. At about the first of February, 1939?

A. Yes, as shown here.

Q. Will you state whether or not that is a correct record of the testimony of Mr. Merrill, in so far as it goes?

A. It is.

(Thereupon, documents were marked for identification as Commission's Exhibits 2955-A to 2955-T, both inclusive, and 2956-A to U, both inclusive.)

By Mr. MacIntyre:

Q. Mr. Bickler, I now show you documents which have been marked for identification as Commission's Exhibits 2955-A to T, and 2956-A to U, and ask you to state, if you can, what they are (handing documents to witness)?

A. These are portions of the testimony of Mr. Harry Koch.

Q. K-o-c-h?

A. K-o-c-h.

Mr. Koch is connected with the Lone Star Cement Corporation in New York City, and this testimony was taken recently at New York, and this is a correct transcript of those portions of his testimony.

18682 (Thereupon, documents were marked for identification as Commission's Exhibits 2957-A to 2957-M, both inclusive; 2958-A to 2958-W, both inclusive, and 2959-A to 2959-L, both inclusive.)

By Mr. MacIntyre:

Q. (Show documents to witness) Mr. Bickler, I now show you documents which have been marked for identification as Commission's Exhibits 2957-A to M, 2958-A to W, and 2959-A to L, and ask you to state what they are, if you can?

A. These are portions of the testimony of the witness J. F. Nyland, who is general sales manager of the Lone Star Cement Corporation at New York. This testimony was also given during the recent hearings in New York.

Q. That was during the month of March, 1939?

A. Yes, sir.

(Thereupon, a document was marked for identification as Commission's Exhibit 2960-A and 2960-B.)

By Mr. MacIntyre:

Q. Mr. Bickler, I now show you documents which have been marked for identification as Commission's Exhibits 2960-A and B, and ask you to state, if you can, what they are:

A. That is a portion, or portions, of the testimony of Mr. Louis R. Ferguson, vice-president of the Lone Star Cement Corporation. He resides at Dallas, Texas. His testimony was taken during the December hearing in
18683 the case at Austin, Texas.

Q. And is that a correct record of his testimony, as far as it goes?

A. As reported by us; yes, sir.

Q. I do not believe that I asked you that with respect to this record of the portion of Mr. Nyland's testimony; what can you say with respect to that?

A. That is a true and correct transcript, to the best of our skill and ability as reporters.

Q. A correct report of what he said at the time?

A. Yes.

(Thereupon, a paper was marked for identification as Commission's Exhibit 2961-A to 2961-L, both inclusive.)

By Mr. MacIntyre:

Q. Now, Mr. Bickler, I show you documents marked for identification as Commission's Exhibits 2961-A to L, inclusive, and ask you to state, if you can, what they are (handing documents to witness)?

A. Those are portions of the testimony of the witness R. J. Mahon.

Q. M-a-h-o-n?

A. M-a-h-o-n; yes, sir.

Mr. Mahon is general traffic manager for the Lone Star Cement Corporation, at New York. His testimony
18684 was given recently during the hearing, and it bears the same verity as the other portions.

Q. You can say that this is a correct record of his testimony, then?

A. Yes, sir.

Q. As reported by you to the State of Texas?

A. Yes.

18685 By Mr. MacIntyre:

Q. Mr. Bickler, I now show you documents marked for identification 2962-A to GG, 2963-A to H, and 2964-A to J, and ask you to state what they are, if you can.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

(Whereupon certain documents were marked Commission's Exhibits Nos. 2962-A to 2962-GG, inclusive, 2963-A to 2963-H, inclusive, and 2964-A to 2964-J, inclusive, for identification.)

By Mr. MacIntyre:

Q. And I ask you to state what they are, if you can.

A. These are portions of the testimony of Bryan Oldham.

Mr. Oldham is divisional sales manager for the Lone Star Cement Corporation, living at Dallas, Texas, and this testimony was taken during the December hearing at Austin, Texas.

Q. Can you say whether or not that is a true and correct record of his testimony as taken by you and certified to the State, in this case?

A. Just like these others, yes, sir.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Do you offer those?

Mr. MacIntyre: No, there is no offer on them, your Honor.

18686 Trial Examiner Norwood: Examine him.

*Cross-Examination by Mr. Leisure.*

Q. Mr. Bickler, these exhibits that have been marked here this afternoon, running from 2949 down to 2964, inclusive; do they represent your own personal work; the physical exhibits, the typewriting?

A. Not altogether; no, sir.

Q. What, if you know, were those transcripts or copies taken from?

A. They were taken from the records which we made at the time of the hearings and official copies were furnished to different attorneys and also a copy made as a filed copy.

Trial Examiner Norwood: They are duplicates of the original record, are they?

The Witness: Yes, sir; exact duplicates.

Mr. Leisure: May I see those, Mr. MacIntyre?

(Thereupon the exhibits marked for identification were handed to Mr. Leisure.)

By Mr. Leisure:

Q. As I understood you to say, Mr. Bickler, you have not personally written these papers?

A. I haven't personally written them; no, sir.

Q. You say that they were taken from transcribed testimony which "we took down." Do you or do you not
18687 mean to say that you took all of the testimony yourself which is represented by these exhibits, here?

A. No, sir. As I stated at the beginning, if you will let me explain a little, we work in shifts, just as I see this hearing is being reported, here.

Q. I suspected that was so, Mr. Bickler.

How many reporters did you have working in Austin, Texas, for instance?

A. There were four of us, there.

Q. And how many did you have in New York, sir?

A. Well, for each day there were two of us.

One week one man reported and he couldn't get back the second week and another man took his place.

Q. That would make four, altogether, in New York?

A. No, three.

Q. And in Austin, Texas, how many reporters did you use there?

A. I stated we had four there. Do you mean Los Angeles?

Q. I meant in Los Angeles.

A. We had three.

Q. And the work of those different reporters is shown by these transcripts here which were taken from their work, is that correct?

A. They should show, up in the upper left-hand corner.

Q. As to who took it?

18688 A. As to who took *it*, yes.

Q. Have you produced here in Court the orig-

inal shorthand notes for our benefit from which these transcripts were made?

A. No, sir.

Q. You don't have those with you?

A. No, sir.

Q. I notice that you said several times these are portions of the testimony. You do not contend—I do not mean contend—you do not say that these transcripts represent the entire testimony given by the witness in question?

A. No, indeed.

Q. They are merely excerpts taken from certain testimony?

A. Yes, sir. And I might state that I have carefully compared those excerpts with the record which we made and I know that these are true and correct copies of those.

Q. Of the record which—

A. —that was submitted by ourselves.

Trial Examiner Norwood: You compared it with the shorthand notes?

The Witness: No, sir; with the typewritten copies.

By Mr. Leisure:

Q. And who, if you know, made these selections which are transcribed here?

A. That, I do not know; just who made those.

18689 Q. Would you be able, by looking at this Exhibit 2958-A, for instance, Mr. Bickler, to tell us whether or not that is the full page as it appears on the original record, or is that an excerpt from that page? I am now referring to what purports to be 2116

A. That is not a full page.

Q. That is an excerpt?

A. Just an excerpt of testimony and—

Q. Do you know whether it is the middle of the page or bottom of page, or where that might appear on the original record? Is there anything on that to indicate to you whether there was something that went before it, or whether there was anything that went after it?

A. Yes, sir. This, I am quite sure, appeared—the first page, here, appeared at the bottom of the page.

Q. Do you know whether it is the last sentence on the bottom of the page, or not?

A. It is the last question on that page, and the matter preceding that—

Q. There is nothing below that, on the same page?

A. Nothing below that. Preceding that was argument of Counsel, or discussion.

Q. Take, for instance, 2951-B, for identification. There are two questions and then there is a row of asterisks.

Does that mean that there was something in the 18690 original record which does not appear there?

A. Yes, sir.

Q. And I suppose your same answer would apply to other places where there are stars through the middle of the page. It means something was left out from the purported original record?

A. Yes, sir; it would.

Q. I notice you mentioned something about certification a moment ago. What do you mean by your use of that term, please?

A. Well, that statute requires that the filed copy which is to be filed in the District Clerk's office in Travis County where the suit is pending—William B. Travis is one of the heroes, by the way, who died in the Alamo at San Antonio; we are very proud of his record. This record has to be certified by the special commissioner in the case. The reporter does not certify to it.

Q. That is what I thought.

Mr. Leisure: I think that is all, Mr. Bickler. Thank you very much.

Mr. Zimmerman: I have nothing.

Trial Examiner Norwood: Anything further?

Mr. MacIntyre: Yes, if Your Honor please; a question or two.

Trial Examiner Norwood: Do you wish any cross-18691 examination, Mr. Zimmerman?

Mr. Zimmerman: No, thank you, sir.

By Mr. Conaghan:

Q. Mr. Bickler, I think you stated you didn't know who made the selection of these excerpts, is that correct?

A. That is correct.

Q. When did you make the comparison?

A. I worked on it yesterday morning, some yesterday afternoon, some last night, and all this morning.

Q. Where?

A. Upstairs in the office and over at my hotel room.

Q. In whose office, upstairs?

A. Some of it I did in Mr. Wooden's office, and some in Mr. MacIntyre's office.

Q. Did you have, at that time, an official transcript to which certification was made by the Clerk of the County, Travis County, Texas?

A. No, there has none been certified, so far. It hasn't been filed because the hearings are still pending.

Q. None will be filed until the hearings before the Commission are concluded?

A. Yes, sir; that's it.

18692 Q. What is this proceeding, before the Commission? What type of a proceeding is it, can you tell us?

A. Under our anti-trust statute the attorney general has the power to apply to the court for the appointment of a special commissioner to take testimony at designated places and times which may either be designated or agreed upon.

Q. And such application was made in a proceeding in Texas?

A. Yes, sir.

Q. And who was appointed special commissioner?

A. Mr. W. A. Keeling, former attorney general of Texas.

Q. Has Mr. Keeling been presiding at all sessions since the taking of testimony commenced?

A. He has.

Q. Has Commissioner Keeling any power to pass upon the admissibility of evidence?

A. He does not.

Q. Just what does he do, just what function does he perform?

18693 A. I will state it the best I can, from my memory of the provisions of the statute.

He has the power to issue notices requiring the attendance of witnesses. He calls the hearings. He conducts those hearings and trics, as far as possible, to keep order.

By Mr. Conaghan:

Q. Well, now, the transcript as taken before the Commissioner; is that public information before it is filed with the Clerk of Travis County, Texas?

A. I would say that it is. We are permitted to make

copies of it and sell them, distribute them to those who desire to have them.

Q. To other than counsel for the companies in the case?

A. Yes, sir.

Trial Examiner Norwood: Those hearings are public hearings, are they?

The Witness: Yes, sir.

By Mr. Conaghan:

Q. When you copied these excerpts from the official transcript, how were the excerpts designated in that transcript?

Mr. MacIntyre: If Your Honor please, we object. The witness has not testified he copied any excerpts from any transcript.

18694 By Mr. Conaghan:

Q. When you compared them, I should have said.

A. How they were designated in the transcript?

Q. Yes.

A. I had a sheet showing the number to which the page—at which the page appeared and the sheet was outlined in red pencil at the side.

Q. Do you know who made out those sheets?

A. No, sir; they were just handed to me for comparison.

Q. Who handed them to you?

A. Mr. MacIntyre, most of them; some were brought in by some of the clerks.

Q. And when were they handed to you?

A. Here, yesterday, and today.

Q. How many companies were originally parties defendant in the original suit at Texas?

Mr. MacIntyre: If Your Honor please, we do submit that that does not go to the identification of that of the testimony given in the case. As to how many people originally were parties and how many now are parties—

Mr. Conaghan: It has already been brought out by Mr. MacIntyre himself certain companies were respondents in the Texas proceeding. I want to find out how many originally were Respondents and who are now.

Trial Examiner Norwood: And who the others were, not heretofore shown.

18695 Mr. Conaghan: Yes.

A. There were six defendants originally, and two were dismissed from the case.

By Mr. Conaghan:

Q. What were the names of those companies?

A. I am not sure of those. I think the Republic Cement Company of San Antonio and the other one—I can give you the attorneys who represent them, but I can't give you the exact name of the company.

Q. Longhorn?

A. Longhorn.

Q. Were those companies dismissed by the commissioner or by the judge having jurisdiction of the case?

A. They were dismissed by the judge having jurisdiction of the case.

Q. How long ago?

A. I think that came along in November.

Q. Were you reporting the proceedings at that time?

A. Yes, sir; right from the beginning.

Q. Do you know why they were dismissed?

A. No, sir; I can't state.

Mr. Conaghan: That is all.

Mr. Zimmerman: Just a minute. I do have one question I would like to ask.

18696 Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. Do you know, of your own knowledge, whether or not the transcripts that are made here on typewriter are true and accurate transcripts of the shorthand notes that were taken at the several hearings by the several reporters?

A. I can only say this, that they are as true and accurate a transcript of the shorthand notes as is our record. That is as far as I can go.

Q. You can't say, of your own knowledge, whether they are a true and correct transcript of the shorthand notes?

A. Except of the particular part I reported myself, in shorthand.

Q. Right.

Mr. Zimmerman: Thank you.

*Redirect Examination.*

By Mr. MacIntyre:

Q. Mr. Bickler, I believe you stated that the court has not, as yet, certified the record which you have filed with the court and which it will determine whether or not it will so certify; is that right?

A. Just to be entirely accurate, I have not filed the record with the Commissioner. He has asked me to keep it in my vault until it is completed and then he will make a certification.

18697 I think he wants to make one general page of certification.

Q. These excerpts which have been marked for identification and about which you have testified, I believe you testified already are true and correct records of what the transcript is as you will turn it to the commissioner with the certification as to its correctness.

A. The testimony—I can say this, positively, the testimony of the several witnesses at Los Angeles, Calif., and Mr. Harry C. Koch has been carefully, so they stated to me—

Mr. Zimmerman: I would object to him stating anything that has been stated to him. That is purely hearsay. This witness has been around courts long enough to know better.

Mr. MacIntyre: The witness has a right to state whether or not any of the witnesses who represent the respondent companies in this case have stated to him they have read over their testimony and have agreed it it correct.

18698 Trial Examiner Norwood: That was some of these respondents that made the statement to him?

Mr. MacIntyre: All of these are the respondents' officials.

Trial Examiner Norwood: The objection is overruled.

Mr. Zimmerman: If the Examiner please, the testimony that has been given here, now, is not by the witness but by Mr. MacIntyre. You can't make a ruling on Mr. MacIntyre's statements. It must be by the witness.

Trial Examiner Norwood: Mr. MacIntyre informed me as to the party he understood him to name.

Mr. Zimmerman: The witness has not so stated. I think he was not reviewing the testimony.

Mr. MacIntyre: Let us have his answer read back to you, if Your Honor please.

Trial Examiner Norwood: If it is a statement of one of the respondents, bring that out.

Mr. MacIntyre: May we have the witness' answer? It will show what he said.

Trial Examiner Norwood: Yes. Read it.

(Last answer read by Reporter.)

The Witness: I am sorry for the unfortunate use of the word "stated to me." I meant that by way of
18699 explanation; if you will let me give the whole of this.

Mr. Zimmerman: I am sorry I interrupted you.

A. I want to be fair to all parties. Some of this testimony has been read over and signed by the parties and some have not. I just state that because in those cases I not only have my own feeling about it being true and correct but the fact that they read it over and were willing to sign it and turned it over to me as the file copy.

18703 By Mr. MacIntyre:

Q. Mr. Bickler, are you now prepared to say whether or not you can certify that the documents about which you have testified and which are marked for identification as Commission's Exhibits, here, are true and correct excerpts of your transcript of the testimony in the case about which you have testified; that is, the Texas case?

Mr. Leisure: Have you finished?

Mr. MacIntyre: Yes.

Mr. Leisure: I object to that question because the examination which has been conducted here shows that the witness is not in a position to do that. He has admitted that part of these minutes were not taken by himself.

The original shorthand minutes are not here in Court so that he—

Trial Examiner Norwood: He is speaking, now, of the record. The objection is overruled.

Answer the question.

A. I can only positively and unqualifiedly certify to that portion which I reported myself, but I may make an explanation as to the balance of this, if permitted to do so.

18705 By Mr. MacIntyre:

Q. Mr. Bickler, again referring to Commission's Exhibit, for identification, 2949-A to H, I believe you already testified that that is a portion of a record of the testimony of Frank H. Powell, president of the Southwestern Portland Cement Company?

A. Yes, sir.

Q. Has he agreed that that is a true and correct statement of his testimony?

A. He signed the testimony in my presence.

By Mr. MacIntyre:

Q. He signed the testimony as being correct?

A. Yes.

Q. In your presence?

A. Yes.

Trial Examiner Norwood: And your testimony is that that is a correct copy of this record?

18706 The Witness: Yes, sir.

Trial Examiner Norwood: In this Texas proceeding, you testify to that, do you not?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Now, Mr. Bickler, I again show you documents marked for identification as Commission's Exhibit 2950-A to N, inclusive, 2951-A to QQ, inclusive, and 2952-A to BB, inclusive, and I ask you to state whether or not that is any portion of testimony which Mr. Blair signed as being correctly reported?

A. He did sign this in my presence.

Trial Examiner Norwood: Which ones are those?

The Witness: This is Mr. Blair.

Trial Examiner Norwood: What number?

Mr. Withrow: 2950, 51, and 52.

The Witness: 2950-A—

Mr. MacIntyre: 2950, 2951, and 2952.

18707 Trial Examiner Norwood: Yes, go ahead.

By Mr. MacIntyre:

Q. That is, he signed it as a correct report of his testimony?

A. Yes, after he had been given an opportunity to read through it and make such corrections and changes as he desired to make, and those were made before it was finally submitted to him for his signature.

By Mr. MacIntyre:

Q. Can you say that also with respect to Commission's Exhibits 2953-A to U?

A. I can say that with respect to all of Mr. Blair's testimony, and this is a portion of it.

Q. Now, I will show you again documents, which have been heretofore marked for identification as Commission's Exhibits 2954-A to K, and ask you to state whether or not that Mr. Merrill signed the testimony he gave, and of which he testified that that is a part, as being correct?

A. He did.

Q. (Showing documents to witness) I now show you documents heretofore marked for identification as Commission's Exhibits 2955-A to T, and Commission's Exhibits 2956-A to U, and ask you to state whether or not that that is a portion of the testimony of Mr. Koch, and will you also state whether or not he was shown the testi-
18708 mony, whether he read it, and whether he signed it as being correct?

A. It is a portion of his testimony; it was shown him; he made corrections, indicated corrections, and we made the corrections in the record, and then returned the record to him for his signature, and he signed it in my presence.

Q. And this is from the corrected testimony as signed by him?

A. Yes, sir.

Q. Can you say whether or not that Mr. Nyland has read and returned to you a signed copy of his testimony?

A. He has not.

Q. What about Mr. Ferguson, L. R. Ferguson?

A. He has not, either.

Q. What about Mr. Mahon, R. H. Mahon?

A. The same as to Mr. Mahon.

Q. What about Mr. J. Bryan Oldham?

A. The same as to Mr. Oldham.

Q. (Showing documents to witness) Mr. Bickler, I now direct your attention to documents heretofore marked for identification as Commission's Exhibits 2957-A, B, C, D, K, L, and M, and ask you to state whether or not that you took that particular portion of Mr. Nyland's testimony as is shown by those particular exhibits and transcribed it?

A. I did not take all of this.

Q. No, I am talking about the numbers that I have given you.

18709 Trial Examiner Norwood: What are those letters?

The Reporter: A, B, C, D, K, L, and M.

The Witness: A, B, C, D are my own—are from my own notes.

Mr. Leisure: Did you say B, Mr. Bickler?

The Witness: A, B, C, D.

Mr. Leisure: A, B, C, D?

The Witness: Yes—the same is true of K, L, and M.

By Mr. MacIntyre:

Q. What can you say as to whether or not that the testimony of Mr. Nyland, as shown on those pages, is correctly reported, as he testified?

A. That is.

Q. Now, calling your attention to the documents marked for identification as Commission's Exhibits 2956-A, B, C, D, E, F, G,—what can you say with respect to that testimony (showing documents to witness)?

Did you or someone else take that?

Trial Examiner Norwood: That is A to G?

Mr. MacIntyre: That is right.

Trial Examiner Norwood: 2956.

A. 2956-A to G, that was reported by me, and is a correct transcript.

18710 Q. What can you say as to whether or not that is correctly reported as the testimony of Mr. Nyland?

A. It is.

Mr. MacIntyre: That is all.

Mr. Leisure: May I ask him some questions, if Your Honor pleases?

Trial Examiner Norwood: Yes.

*Recross-Examination*

By Mr. Leisure:

Q. Mr. Bickler, I was not quite clear from your explanation to Mr. MacIntyre as to how these corrections were made.

You said that—and you correct me, if I am wrong?

A. Yes—

Q. —you gave the witness a copy of the record and he made certain corrections, is that what you said?

A. Yes, sir. He would indicate those on what we call a correction sheet.

Q. Yes. And each one of these witnesses that you have mentioned, they did make corrections and signed—they made some corrections, as I understand you?

18711 A. Yes, sir.

Q. Now, having made the corrections, did they sign the record itself, or this transcription that you have here? What was it that they signed?

A. They signed what we call the filed copy, which is to be filed later in court.

Q. After the corrections were made?

A. After they were made, and the corrected places had been pointed out to them and they were satisfied that the corrections had been made as they desired them made.

Q. Yes.

A. And in accordance with the correction sheet.

Q. I see.

What copy of the record did you have to make your comparing here with this, as you have described?

A. I don't believe I understood that question.

Q. I thought you said here, upstairs, that you compared these sheets with some copy of the record—you corrected a copy?

A. Yes, it was one of the copies of the record that we made.

Q. It would be one of the other copies that you compared this with?

A. Yes.

Q. Now, as to these of Mr. Nyland's which you took yourself,—you say as to those, those are correct

18712 copies of the testimony?

A. Yes, sir.

Q. Well, now, in the instance of all these other witnesses, as you have told me, they all made certain corrections.

A. Well, I mean, as I stated it in the beginning, that Mr. Nyland has not submitted his corrections, as to typographical errors,—maybe a mishearing of a thing, or something of that sort.

Q. Then how can you say, sir, that this is a true and correct copy if all the other witnesses to whom you exhibited the record made certain corrections,—how can you say that Mr. Nyland's is a true and correct copy—

A. You remember back—

Q. —if he has made no corrections?

A. You remember back in the beginning of my testimony, I made the reservation, that those that had not been signed were correct to the best of my skill and ability as a Reporter, the years I have been reporting and the experience I have had.

Q. Now, as to the ones that Mr. Nyland—as to the testimony that he gave, which you took,—do you have with you here today the original minutes, your original shorthand notes, for our benefit, so that we may examine them?

A. No, sir; they have been sent on.

Q. You do not have those in the court room?

18713 A. They have been sent back to Austin.

Mr. Leisure: I think that is all.

Thank you.

18714 *Redirect Examination by Mr. MacIntyre.*

Q. Now, you spoke about the filed copy being the copy that these witnesses have examined and signed as being correct?

A. Yes.

Q. What difference, if any, Mr. Bickler, is there in that copy and the copy with which you compared these excerpts, if you can state?

A. There should be none.

I will explain our method, if you do not mind my going into that.

Trial Examiner Norwood: Go ahead.

The Witness: When these correction sheets are turned into us we have our typist make out the list of corrections which have to be made from this list, and then I—we make this on what is called the ditto duplicating machine, the master copy of that is corrected in accordance with this correction sheet, and new pages are run off. Also, each party is given a number of these errata sheets, correction sheets, so they can check again with the record.

We have tried in that way to check and double-

18715 check the thing.

Q. Would you then say that the copy of the record with which you compared these excerpts, that is, that copy is a duplicate of the filed copy which has been corrected and signed by these witnesses?

Mr. Leisure: Now, I object to that. That is like the question that was asked a moment ago, to ask this witness to subscribe to minutes that he had not taken.

Mr. MacIntyre: If Your Honor please—

Mr. Leisure: The witness has not said he wrote the entire record.

Trial Examiner Norwood: He said he compared them.

Mr. MacIntyre: Yes.

Mr. Leisure: But this is going farther than that. This is asking if he can certify to somebody else's record being correct.

I object.

Mr. MacIntyre: He has compared the two records. I am asking him whether or not he can now state this is a duplicate after having compared the two.

Trial Examiner Norwood: The objection is overruled.

Mr. Leisure: The witness has not said he compared the two records. That is the point of my objection.

Mr. MacIntyre: I submit that the witness has so testified.

18716 Trial Examiner Norwood: Yes.

Did you say that you compared the two records, Mr. Bickler?

The Witness: I beg your pardon—I did not say I compared them. I said they were prepared in the same manner, these corrected sheets were put into the record in the place of the ones that had been corrected.

Trial Examiner Norwood: They are produced from the same master plate, are they?

The Witness: Yes.

By Mr. MacIntyre:

Q. Could there by any difference in the wording of the copy with which you compared these excerpts and the filed copy, since they came off of a duplicating machine, Mr. Bickler?

Mr. Leisure: May we hear the question?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. Leisure: Oh, I object to asking the witness to speculate on that. He has already told us that corrections were made. I do not think that we should ask him to speculate.

Trial Examiner Norwood: He understands the process. He may explain what invariably may be expected from it, I take it.

Mr. Leisure: But unless the witness has done it
18717 himself, he could not say whether or not the correction sheets had been compared. I think it is an unfair question.

Mr. MacIntyre: Your Honor please, the witness has testified he did it for 32 years.

Mr. Leisure: I have no objection to the witness' work, himself, anything he does, himself.

Trial Examiner Norwood: He may question him as to the accuracy of these copies, whether or not there is any possibility of there being a variation in one sheet—

Mr. Leisure: That is not it.

Trial Examiner Norwood: —from another produced from the same master plate.

Mr. Leisure: That is not the point of my objection. Mr. MacIntyre covers more than that in his question. It includes the corrections, and I say the witness could not possibly know whether the corrections—

Trial Examiner Norwood: I am going to overrule your objection.

I ask the witness to explain fully about it.

The Witness: Well, the word "could" is used there, and that leaves it open to a good many things.

Mr. MacIntyre: Will you please read that question.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

18718 Mr. MacIntyre: Off the same duplicating machine.

Trial Examiner Norwood: Can you answer that?

The Witness: The only chance I see where there could be any difference is where just human error caused—is responsible—for the fact that a corrected sheet was not inserted in some place, but each corrected sheet is the same throughout.

By Mr. MacIntyre:

Q. That is whether it is in the filed copy or in the copy with which you compared these excerpts; is that not true?

A. Yes, sir.

18720 Mr. Wooden: There are some papers I have asked the Reporter to mark for identification. They are a group of papers which consist of copies of documents from the files of the Portland Cement Association at Chicago, obtained recently by a representative of the Commission who is attached to the Chicago office.

I spoke to Mr. Leisure about these papers informally and my understanding is that he will waive identification of them subject to such other objections as he may make on other grounds.

I am having the Reporter number them and I can't give the number because they are not completed, but I
18721 will offer them in evidence at this time in the expectation that identification of the papers will be waived in order that it may not be necessary to call a witness, or two witnesses, from Chicago merely to certify as to the authenticity of these papers.

Mr. Leisure: I don't want to be in the position of having reneged on an agreement. What actually happened was Mr. Wooden asked me if I would be willing to waive identification and I said I didn't like to waive identification on something I had never seen.

Let me see the papers and I have no doubt but perhaps we could come to some understanding on them. I haven't yet seen them, and I don't want to be held to an agreement until I have seen the papers, but, as I understand it, I doubt whether there would be any disagreement on the identification part.

18722 Mr. Leisure: To save time, Tuesday, I wonder if Counsel would leave that, then, over the recess, until Tuesday.

Mr. Wooden: When I get the numbers, that may be done, but my object in doing it at this time was in the hope that we might know whether it is going to be necessary to call a witness from Chicago to identify these papers. It seems I can't even get any satisfaction on that before Tuesday.

Trial Examiner Norwood: Possibly when you get the papers in here Counsel can agree on that.

Mr. Wooden: My understanding is that the nature of these papers is already known to Counsel. The papers which I have been referring to have been numbered, for identification, as Commission's Exhibits 2965-A and B, 2966-A and B, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988-A and B, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998-A and B, 2999, 3000, 3001-A and B, 3002, 3003, 3004, 3005-A to F, inclusive, 3006, 3007-A, B, and C. (handing documents to Mr. Leisure).

I am presenting those papers to Counsel for the Respondents in order that they may examine them and make their objections, and in the hope and expectation
18723 that they will consent to waive identification and save the time and expense necessary in calling witnesses from Chicago.

Mr. Leisure: I would be very glad to look at these, Mr. Wooden, and I hope that can be accomplished, too. Would you like for us to look at them and now and dispose of them now?

Mr. Wooden: If you think you can.

Mr. Leisure: I don't believe I can in the amount of papers you have here. There are 42 pages.

Mr. Wooden: You have means of checking them any time.

Mr. Leisure: Don't you think it would be better if we looked at them and stated whatever objections we have got, aside from identification, all at one time, instead of having it at several places in the record? It seems to me that would be a more orderly procedure, and unless something turns up on these we can let you know our decision after we check them over the week end.

Mr. Wooden: I would like to get the matter of identification out of the way in order to determine whether I will have to call the witnesses here, or not.

Mr. Leisure: How long have you had these papers, Mr. Wooden?

Mr. Wooden: A week or so.

18724 Mr. Leisure: You see what my problem is, Judge (going to the Examiner's desk). Here is a typical example (indicating on a document to the Examiner.) I have no authority to say that is a true and correct copy, and we waive identification until I have checked.

There is nothing I can do about it in the courtroom. It hasn't got a signature which any of us at Counsel table can recognize.

Trial Examiner Norwood: Counsel might offer these and look at them over the week end.

Mr. Wooden: I have done that.

18725 Trial Examiner Norwood: Then the proffered papers are turned over to Counsel for the Respondents to study and make is objections on, is that satisfactory?

Have they been photostated?

Mr. Wooden: There are copies of them, yes.

Trial Examiner Norwood: That is satisfactory, isn't it?

Mr. Wooden: Yes; I expect so.

Referring to Exhibit, for identification, 2604-A to F, inclusive, 2605-A to E, inclusive, and 2606. I propose, on the record, a stipulation for Mr. Zimmerman's consideration to this effect, that if Harold W. Bangert, now at Fargo, North Dakota, and formerly employed as an investigator by the Federal Trade Commission, were called as a witness he would testify that he did certain work on the cement investigation to the time of his departure in 1933, about the time that Charles M. Johnston also left the employ of the Commission.

That he did some finishing-up work at Mr. Johnston's request and that he has some recollection of obtaining the exhibits numbered and named as I stated from Mr. Wecker of the Marquette Company.

That the small letters in ink in the upper left hand corner of 2604-A, 2605-A and 2606 were placed there 18726 by himself in his own handwriting at the time he obtained those papers; that he would identify a certain interview report bearing the name of Charles M. Johnston and purporting to transmit and submit the exhibits numbered and named as I have stated, among other papers.

That the handwriting in the name of Charles M. Johnston is his own handwriting—that is, Mr. Bangert's handwriting, signing for Mr. Johnston and that his, Mr. Bangert's initials also appear below Johnston's name.

I also propose a stipulation for Mr. Zimmerman's consideration that if Miss Elizabeth Carroll, now an employee of the Chicago office of the Commission, were called as a witness, she would testify to having written the interview report to which I have referred, and that the longhand writing in the upper right-hand corner of Exhibits 2604-A, 2605-A, and 2606 is hers.

That is was placed on there as of the date indicated by the date in that handwriting.

That she placed the initials "C.M.J." upon those papers in her handwriting and that the small "c", very small "c" which follows the initials "C.M.J." is her initial, placed there at the time she received those papers from Mr. Bangert.

18727 I further propose that Mr. Zimmerman stipulate that these two witnesses may be taken as having testified to the effect described.

Mr. Zimmerman: I will be very glad to give it consideration and advise you.

18728

Washington, D. C.,
April 4, 1939.

18730 Mr. Leisure: This group of exhibits we have gone over over the week end and we find the entire group of exhibits, these Exhibits 2965-A and B through 3007-A to C, inclusive, consists of documents which were turned over to the Federal Trade Commission investigators by representatives of the Portland Cement Association, which is not a Respondent in this case.

18731 I would like to call Your Honor's attention to the fact that these documents were offered in evidence by no witness whatever and that no one who could vouch for the truth or accuracy of any of the documents in question has been called upon to testify.

The most that can be said is that Counsel for the Commission has stated that these documents come from the files of the Portland Cement Association.

These exhibits go back as far as 1931, a period which we feel is quite remote and we feel unless the relevancy clearly appears that this factor should be considered by Your Honor.

I would like also to specifically raise the objection that these exhibits have to do with negotiations with the Portland Cement Association and certain cement companies with relation to again becoming members of that promotional trade association.

The documents themselves consist of statements made by the officers of a promotional trade association in the nature, in some instances, of puffing the services rendered and inducing companies to join or sustain their membership in that association.

There is no showing that the Institute, the defendant in this case, ever saw copies of these documents or that it ever acted upon such documents in any way.

18732 There is no offer of proof as to make these documents admissible as being relevant or material to the issues raised in this proceeding.

All of the statements concerning the effects of the action of the Portland Cement Association are merely inadmissible hearsay.

For all of these considerations we wish to object to these documents as being incompetent, irrelevant, and immaterial. They do not prove or tend to prove any of the issues in this complaint raised by this complaint. All of these documents are dated during what the evidence now shows was the dormant period of The Cement Institute. These documents are written to or by companies which were not members of the Institute. All of these documents contain numerous hearsay statements which are inadmissible even under any theory of the admissions or co-conspirators since they do not constitute admissions of fact.

These documents contain numerous expressions of opinion which the witnesses could not make if they were on the witness stand. If they are offered as admissions of co-conspirators, then there is no reference to the Portland Cement Association or any of its officers as being co-conspirators in this case, and they should be mentioned in the pleadings in order to be binding upon these 18733 Respondents.

The statements contained in these documents are not such statements as would constitute admissions, even if made by co-conspirators, in that they are not statements made in the course of any act in furtherance of the alleged conspiracy.

It should be noted that pursuant to request by Counsel for the Commission we have made no point of the fact that the documents are copies and do not contain the proper authentication from the Portland Cement Association.

However, Your Honor, if we do find that these typewritten copies are in any way incorrect, we have not had the opportunity, naturally, to check them all, over the week end, but if we do find any of them are incorrect we ask permission to make such corrections and to have it go back as of the time of the original identification.

Trial Examiner Norwood: Well, but Counsel makes no objection to the identification, does he?

Mr. Leisure: What I mean by identification, Your Honor, is that they are authentic documents from the Portland Cement Association.

Trial Examiner Norwood: Yes.

Mr. Leisure: I do not want to go beyond that, however, and vouch for the truth or accuracy of the
18734 statements that I know nothing about.

Trial Examiner Norwood: Yes, I understand.

Mr. Wooden: Do you mean to say, Mr. Leisure, that you concede that the documents are authentic, and that they were written as they purport to be written—

Mr. Leisure: Yes, that is what I mean, but I do not say—

Mr. Wooden: —and received by the parties to whom they were addressed?

Mr. Leisure: Why, I think it is clear what identification means when I answered Your Honor's question; it simply means that the document—

Trial Examiner Norwood: In other words, I take it, in substance, it is waiving further identification subject to check?

Mr. Leisure: That is my understanding.

Trial Examiner Norwood: Yes, I think so.

Go ahead.

Mr. Wooden: Well, the offer was made, I believe, on Friday, subject to this objection that has now been made.

Trial Examiner Norwood: Yes. What have you to say as to this objection?

Mr. Wooden: Your Honor, included among the papers are lists furnished by the Portland Cement Associ-
18735 ation giving the names of its membership, as of certain dates, and the names of its board of directors as of certain dates.

The lists of members will be found to consist, very largely, of concerns that are also members of Respondent Institute. The board of directors will be found to consist, very largely, of important executives and officials of members of Respondent Institute, and of the board of trustees of Respondent Institute.

As to the relevancy and materiality, I do not know that —the objection is made, I guess, covering all grounds— but the record included in those exhibits, coupled with other evidence in the record, shows that a number of concerns resigned from the Portland Cement Association because of certain unsatisfactory competitive conditions, and made it a condition of their going back into the Association the remedying of those conditions.

These papers show that a number of concerns went

back in the Portland Cement Association on condition that the Marquette Company become a member, and that on the very day that Marquette filed, signified its return to the Association, it put out the announcement of a 40-cent per barrel increase in price, after having been solicited by members of the board of directors just two or three days before that.

18736 Mr. Leisure: Well, in order that Mr. Wooden's statement may not be misinterpreted by Your Honor, I think that he or I should make clear to Your Honor that when he says the members were the same as in the Institute—

Mr. Wooden: I did not say absolutely.

Mr. Leisure: —that at the time that this correspondence was being carried on they were not members of the Institute at all, and our point is the fact, if we are dealing with conspiracy here, that they at some subsequent time should join the Institute that would not give them authority at some previous time to bind other alleged co-conspirators by so-called admissions.

Trial Examiner Norwood: Well—

Mr. Leisure: And this statement he has just made about inducing them to come back into the Association, I think it should be very clear to Your Honor that he is now talking about the Association.

Mr. Wooden: Oh, yes.

Mr. Leisure: And not the Institute. And the Association is not a party defendant in this proceeding. So that broad general language, which is broad enough to cover the Institute, should be scrutinized, because they were not members of the Institute and the Association at the same time.

Mr. Wooden: Well, I should have said, Your
18737 Honor, that all the parties involved are named as Respondents separately, in addition to any connection they may have had with the Institute.

Trial Examiner Norwood: Well, even in the most strict sense,—that is, in the strict consideration of the requirements of showing a conspiracy, and so on, letters written prior to the alleged conspiracy might be received and considered to show state of mind or intention of the members who afterwards went into it, is that not right?

Mr. Wooden: Of course, this alleged conspiracy—

Mr. Leisure: I know of no rule of evidence that would

allow the proceedings in one Association to be offered as binding against a totally different defendant, unless some connection is shown.

Mr. Wooden: Well, there is plenty of connection shown.

Mr. Leisure: There has been no connection shown between the Association and The Cement Institute, as far as this alleged conspiracy is concerned, and unless they were engaged in a common enterprise, so that the admissions could be used, and the acts, in furtherance of some conspiracy, I know of no rule of evidence that would allow those statements and letters to be introduced in evi-

dence against a totally different association, namely, 18738 the Institute.

Mr. Wooden: The membership, and the controlling interests, in both organizations, Your Honor, are very largely the same as shown by some of the papers offered there, and we had also in the record testimony and exhibits concerning the Portland Cement Association that shows at the meetings of that organization it was not an unknown thing for Respondent Companies, and their officers, to discuss competitive questions.

Mr. Leisure: Well, if Mr. Wooden felt that way about it, he crossed that bridge definitely when he drew his pleadings.

Mr. Wooden: I did not draw them.

Mr. Leisure: And if he felt as he feels, apparently, today, and is now stating on the record, he had one right and one duty, that was to include them in the complaint, and he has not done so.

Mr. Wooden: I didn't draw the pleadings in the first instance, and if I had there were some things that developed in the course of hearings that were not known before the pleadings were drawn.

Mr. Leisure: That defect can't be cured by offering evidence now.

Mr. MacIntyre: As Mr. Wooden has pointed out, Your Honor, these individual companies that were in-

18739 volved in these transactions as shown by these papers under this offer were members of The Cement Institute, and if they were not, nevertheless, they are individual Respondents in this case.

When I say they were members of The Cement Institute, let us refer to one of the instances; that of the com-

pany represented by Mr. Vanderwerp at this Chicago meeting of the board of directors of the Portland Cement Association. He represented the Medusa Portland Cement Company at that meeting and they were a member of The Cement Institute during 1932 and represented in The Cement Institute by one of its vice-presidents, Mr. D. H. MacFarland, who was, at that time, president of The Cement Institute.

I don't know how more thoroughly they could be involved with the Institute than that, and Mr. B. H. Rader of the Lehigh, who was a member of the board of directors of the Portland Cement Association, attended a meeting, and as to the connection of those companies with The Cement Institute I don't think there is any doubt on the facts of the record.

Trial Examiner Norwood: Your contention is that these Respondents, some of them or all of them, carried out the activities evidenced by this paper through the instrumentality of the Portland Cement Association.

18740 Mr. Leisure: That hasn't been alleged in the complaint.

Mr. Wooden: An instrumentality, in part, and you might say, in part, on the occasion of its meetings—I guess instrumentality covers the most substantial and important phase of it.

Mr. Leisure: We claim total surprise. There is no such allegation in the complaint, and in reply to Mr. MacIntyre's statement I think he knows full well this group of papers has to do with Dewey, Hawkeye, and other companies, and that is the purpose of the offer. It doesn't have anything to do with Medusa.

Trial Examiner Norwood: You don't think it could come under any other allegations of the complaint without a specific allegation as to the particular means employed?

Mr. Leisure: No. I think Respondents, when they are brought into court, even today, still have some rights, and I think one of its rights is that they are entitled to know, when they start a trial, who the Respondents are and what the charges are against them. I don't think you can start a case and just enlarge it indefinitely as you go along from day to day and include everyone whom you think happens to know one of the Respondents in this case.

18741 Trial Examiner Norwood: Isn't there a difference in that regard as to a jury trial that is started and continues just a few days and an exhaustive investigation like this that runs along a year and there is ample time to meet any evidence put in?

Mr. Leisure: If we are supposed to meet the evidence of the charge of conspiracy with The Cement Institute and a new defendant I would like to have the opportunity of conferring with counsel of that association, and I would like to have them brought in formally and find out what the defense should be. I haven't had that opportunity, yet.

Trial Examiner Norwood: I shall study these and determine whether or not the matter comes under some of the allegations of the complaint, and whether it is relevant and material, and so on.

Mr. Wooden: The contents of the papers come back to this: Do these papers represent in the evidence the acts of certain Respondents in this proceeding? The answer to that is quite obvious. They are acts of a number of individual company Respondents, and of their representatives.

It doesn't matter whether it was handled through the Portland Cement Association or through the Masonic Lodge or through some church organization, or
18742 what not, if they are relevant and bear upon the issues of the case.

Trial Examiner Norwood: I am inclined to think Counsel is right about it, but I shall look those over.

Mr. Leisure: I made that statement from time to time through the record, and at last we have got Counsel stating his position on that; that members of a lodge or certain political parties, whatever they might be, might be included in this case if he feels like including them. I am glad we have got it at last on the record.

Mr. Wooden: If I can get some evidence that at a lodge meeting a number of these Respondents got together and discussed prices, I certainly will offer it.

Mr. Leisure: You will have a case, then. You should have alleged that before you started, though.

Mr. Withrow: Before you rule on those exhibits, Your Honor, I would like to request Mr. Zimmerman be given an opportunity to make his objections to them since they

directly concern the Marquette Manufacturing Company, and I am sure he would like to make some objections.

Trial Examiner Norwood: Yes. He will be in in a few minutes. He telephoned me he would be delayed a few minutes.

That covers the proffer of Commission's Exhibits, 18743 for identification, 2965 to 3007-C, as I understand it.

Mr. Wooden: Yes.

Mr. Withrow: Yes.

Mr. Wooden: Will you mark these for identification?

(The documents referred to were thereupon marked for identification as Commission's Exhibits 3008-A, 3008-B, and 3008-C.)

Mr. Wooden: Your Honor, when Mr. Mallory was on the stand he was requested, among other things, to produce a list of his subscribers to his Statistical Service beginning in 1926 and running down to September, 1933.

Mr. Leisure, the other day, handed me the papers which I have had the Reporter mark as Commission's Exhibits 3008-A, B, and C, for identification, and I will offer them in evidence at this time (handing documents to Mr. Leisure):

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 3008-A, 3008-B, and 3008-C, was received and offered in evidence.)

Mr. Wooden: Your Honor, I would suggest we proceed at this time with the further inspection of the inter-
18744 view reports of Messrs. Royal and Bass with a view of getting Counsel's decision as to whether they wish those men recalled for further cross-examination.

Trial Examiner Norwood: Yes. Well, we will do that now.

Off the record.

(There was a short discussion off the record.)

Trial Examiner Norwood: Back on the record.

The Reporter will give the documents to Counsel for the Respondents: these are Commission's Exhibits 2922 to 2948, inclusive.

(The Reporter complied with the Examiner's request.)

Mr. Leisure: Shall we proceed with the reading of these?

Trial Examiner Norwood: Yes.

(Thereupon Counsel proceeded with further inspection of the interview reports heretofore referred to.)

18761 Mr. Wooden: Your Honor, at this time I wish to offer a number of exhibits, consisting of the correction sheets to the various freight rate books put out by The Cement Institute. They are all bound, and according to the States, each State comprising one book. They are the documents which were supplied to us by Counsel for the Respondents, Counsel McFadden for Re-

18762 spondents, in November, 1937.

They have been numbered for identification beginning with Commission's Exhibit No. 3009 and running to 3040. I understand that in some cases there were some correction sheets supplied after November, 1937.

Trial Examiner Norwood: They have been marked up to Commission's Exhibit 3044.

Mr. Wooden: 3040 is this particular group. There are some that fall in a somewhat different category.

Trial Examiner Norwood: Yes.

Mr. Wooden: I will mention that in a moment.

Trial Examiner Norwood: Yes.

Mr. Leisure: Your Honor please, that is a considerable group of exhibits, and unless there is some showing as to why they are being offered I do not see why we should encumber the record with them.

Trial Examiner Norwood: Well, they are correction sheets to the freight rate books, are they?

Mr. Wooden: They are correction sheets to the freight rate books.

Mr. Leisure: The freight rate books were complete as of the date they were issued, as they have been offered. Unless there is some purpose shown for introducing 5,000 pages of supplements or correction sheets, I do not see why we should encumber the record with it, unless

18763 there is some showing. We have had samples right along as to how the method worked.

Trial Examiner Norwood: I think that both sides urged and emphasized the necessity of considering the correction sheets along with the books, and if the books are relevant and material I should think that the correction sheets would be.

Mr. Wooden: I understood Mr. Leisure to say if we did not offer the various correction sheets that they would, and I told him that I expected to do it.

This is foundation material, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Wooden: And it may be used for all sorts of purposes in analyzing the delivered prices which are the subject of this case, breaking those prices down, or building them up, and so forth.

Mr. Leisure: Well, it seems to me a sample of each one would cover that without putting in 5,000 pages here of exhibits.

Trial Examiner Norwood: Well, they are all different.

Mr. Wooden: They are different States.

Trial Examiner Norwood: States and localities.

Mr. Wooden: Yes, oh yes, different States, different dates, different destinations, and so on.

18764 Trial Examiner Norwood: I should think they would be absolutely necessary in a study of this case.

Mr. Leisure: I do not see why.

Trial Examiner Norwood: They may be eliminated if the case goes up, by agreement, or in some way, or may be tabulated.

Mr. McFadden: I think that they might be necessary for something that is not in, but I cannot see they are necessary for what is in the record already.

Mr. Wooden: There is no question about the—

Trial Examiner Norwood: Well, the bids and tabulations are in, and it may require them to check the prices. I think it has already been made apparent by cross-examination that these correction sheets are necessary.

Mr. Brick: Those correction sheets are now a part of the record, Your Honor; these are in addition to those.

Trial Examiner Norwood: Yes, I know it.

Mr. Wooden: Just a few isolated ones that are already in; this is the complete thing.

Mr. Withrow: The States of North Carolina, Virginia, and Indiana are already in, and this is added for some 30 or 35 States that need correction—

Trial Examiner Norwood: There is no point 18765 raised as to the correctness of those.

Mr. Wooden: That is my understanding.

Mr. McFadden: I do not know whether they are complete nor whether all the basic books—

(Mr. MacIntyre whispered to Mr. Wooden out of hearing of Reporter.)

Mr. McFadden: I know, Mr. MacIntyre, but I gave you some. I don't know whether you are giving back all I gave you. That is the point,—nor do we know that all of the basic freight books to which these are the supplements are—

Mr. Wooden: If there are errors we would be glad—

Mr. McFadden: We don't know whether the basic freight books are in the record to that extent. I just want to explain in answer to Your Honor's question as to the proposition—

Trial Examiner Norwood: Yes.

Mr. Wooden: If there are errors we would be glad to have them, but we understand that so far as these go, at any rate they are authentic.

Mr. Leisure: Well, unless and until it appears that they are in some way material and relevant to some issue in the case we object to them, Your Honor.

I do not see the necessity for this, and unless there is some problem by which a correction sheet makes
18766 it material and relevant, I object. Just to put in all of these papers simply because they happen to be correction sheets, I can see no purpose of it, and I object to it.

Mr. Wooden: The freight rate books are not the expression of the rates that were in effect at the time the correction sheets were issued. That is the reason the correction sheets were issued. They modified it.

Trial Examiner Norwood: If the freight rate books are relevant, these are, too, and I shall overrule the objection and admit these as Commission's Exhibits 3009 to 3040, and state that each number represents a bound booklet whose pages are numbered numerically.

Now, please recite in the record the number of pages after listing exhibit in the record.

Mr. McFadden: When these supplements were supplied to the Commission in answer to their request, there were no covers on them with the statements that now appear on the covers.

Mr. Wooden: That is right.

Mr. McFadden: And since the cover bears the same number as the first sheet inside, I suggest that we remove the covers.

Trial Examiner Norwood: Well, I think you might leave

the covers on there for convenience. It is under-
18767 stood they are not in evidence.

Mr. Wooden: It is understood that the covers were not supplied and they are not a part of the correction sheets.

Trial Examiner Norwood: Yes.

Mr. McFadden: I notice also—

I think we might make this statement off the record, please.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Back on the record.

Make your statement there regarding the covers and the enumerating, Mr. Wooden.

Mr. Wooden: It is agreed by Counsel for the Commission that when furnished by Mr. McFadden, that these sheets were not bound and had no facing sheets upon them, and that those facing sheets were put on here in the Commission, and may be disregarded as part of the exhibit except for such incidental aid they may form in determining what each volume is, and that any enumerating on any of the sheets may be disregarded as not being a part of the original exhibit.

18768 (COM. EX. 3009-A to 3009-NNN was offered and received in evidence.)

(COM. EX. 3010-A to 3010-FFF was offered and received in evidence.)

(COM. EX. 3011-A to 3011-NNNNN was offered and received in evidence.)

(COM. EX. 3012-A to 3012-DDDD was offered and received in evidence.)

(COM. EX. 3013-A to 3013-VVV was offered and received in evidence.)

18769 (COM. EX. 3014-A to 3014-KKK was offered and received in evidence.)

(COM. EX. 3015-A to 3015-TTT was offered and received in evidence.)

(COM. EX. 3016-A to 3016-KKK was offered and received in evidence.)

(COM. EX. 3017-A to 3017-QQQQ was offered and received in evidence.)

(COM. EX. 3018-A to 3018-ZZZ was offered and received in evidence.)

(COM. EX. 3019-A to 3019-MMM was offered and received in evidence.)

18770 (COM. EX. 3020-A to 3020-III was offered and received in evidence.)

(COM. EX. 3021-A to 3021-FF was offered and received in evidence.)

(COM. EX. 3022-A to 3022-RRR was offered and received in evidence.)

(COM. EX. 3023-A to 3023-AAAA was offered and received in evidence.)

(COM. EX. 3024-A to 3024-SSS was offered and received in evidence.)

(COM. EX. 3025-A to 3025-QQ was offered and received in evidence.)

(COM. EX. 3026-A to 3026-BBBBB was offered and received in evidence.)

18771 (COM. EX. 3027-A to 3027-XX was offered and received in evidence.)

(COM. EX. 3028-A to 3028-FFF was offered and received in evidence.)

(COM. EX. 3029-A to 3029-MMMMM was offered and received in evidence.)

(COM. EX. 3030-A to 3030-FF was offered and received in evidence.)

(COM. EX. 3031-A to 3031-LL was offered and received in evidence.)

(COM. EX. 3032-A to 3032-PPP was offered and received in evidence.)

18772 (COM. EX. 3033-A to 3033-LLLLLLL was offered and received in evidence.)

(COM. EX. 3034-A to 3034-FFF was offered and received in evidence.)

(COM. EX. 3035-A to 3035-DD was offered and received in evidence.)

(COM. EX. 3036-A to 3036-III was offered and received in evidence.)

(COM. EX. 3037-A to 3037-CCC was offered and received in evidence.)

(COM. EX. 3038-A to 3038-TT was offered and received in evidence.)

18773 (COM. EX. 3039-A to 3039-FFFFF was offered and received in evidence.)

(COM. EX. 3040-A to 3040-AAAA was offered and
18777 received in evidence.)

I have here, also, Your Honor, Indiana rate book No. 1-A; Illinois rate book No. 1-A.

18778 Iowa rate book No. 1-A, compiled and published, all of them, by the Cement Institute Freight Rate

Bureau at Chicago, and which I have had numbered for identification 3041 to 3044, inclusive.

These are compilations which were in the files of the Commission as a part of its price bases investigation, and I am offering them subject to check as to their authenticity.

They are in mimeographed form and I assume there will be no difficulty about them being authentic and so conceded.

Mr. Leisure: We will look at these tonight and state our objection, if we have any, tomorrow.

Trial Examiner Norwood: All right. Is there anything further?

Mr. Leisure: Off the record.

Trial Examiner Norwood: Off the record.

(There was a brief discussion off the record.)

Trial Examiner Norwood: Will you make your statement for the record?

Mr. Leisure: We turned over some papers to Mr. Wooden that he requested of Mr. Mallory. I think a statement ought to be on the record.

Trial Examiner Norwood: Yes.

Mr. Wooden: I have some papers here furnished
18779 by Mr. Leisure as coming from Mr. Mallory, including a letter from Mr. Mallory addressed to me, dated April 3, and containing figures on production and shipments, which I will ask the Reporter to number.

(The letter and papers referred to were marked Commission's Exhibits Nos. 3045-A to H, inclusive, for identification.)

18780 Mr. Wooden: With regard to the Mallory information which I just discussed, that has been numbered for identification as 3045-A to H, inclusive.

I would like to say in connection with that that District 4 does not appear to have been included in the information furnished and that the production and shipments by plants was not furnished as requested and that the capacities I wished for each mill where the rated capacities are shown by Mr. Mallory's records, regardless of whether or not the companies furnished information or reports on their capacities.

Now there is another letter from Mr. Mallory here addressed to me, dated April 3, and submitting a statement of shipments for account of various companies.

I will ask the Reporter to number that.

18781 (The letter referred to was marked Commission's Exhibit Nos. 3046-A and 3046-B, for identification.)

Mr. Wooden: I would like to ask that the data in 3045-A to H, inclusive, be supplemented by furnishing the other information which I have just specified.

I will not offer the papers that have been numbered at this time, Your Honor.

Trial Examiner Norwood: Anything further?

Mr. Wooden: The four rate books that I offered, ending with 3044, were in mimeographed form and consisted of a number of sheets and only loosely bound.

I think the Reporter ought to give those sub-numbers to each sheet before—

Trial Examiner Norwood: Have they numbers on them, already?

Mr. Wooden: On the facing sheets, only, I believe.

Mr. Brick: Which papers are those, Mr. Wooden?

Mr. Wooden: The four exhibit numbers ending with 3044, 3041 to 3044, inclusive.

Trial Examiner Norwood: I will ask the Reporter to number all of those beginning with 3009 and running through to 3044.

Mr. Wooden: Those were the ones offered subject to check and authenticity, but I had supposed the sub-number had been carried all the way through those.

18783 Washington, D. C.,
April 5, 1939.

## PROCEEDINGS.

18784 Trial Examiner Norwood: The hearing will come to order.

In marking the series of correction sheets running from Commission's Exhibit 3009 to 3040, inclusive, Commission's Exhibit 3013-A to 3013-VVV should have been marked 3013-A to 3013-WWW. Also Commission's Exhibit 3018-A to 3018-ZZZ should have been marked 3018-A to 3018-AAAA; also, Commission's Exhibit 3029-A to 3029-MMMMM should have been marked 3029-A to 3029-NNNNN.

Are there any other corrections to the record?

Proceed.

Mr. Wooden: Your Honor, I would suggest at this
18785 time that we proceed with whatever further inspection of the interview reports of Messrs. Bass and Royal is desired.

Trial Examiner Norwood: Yes.

Mr. Wooden: So that we may reach a decision, as early as possible, as to whether they shall be recalled for further cross-examination.

Trial Examiner Norwood: Can Counsel for the Respondents let us know now whether they want to—

Mr. Leisure: Your Honor please, I do not know whether Mr. Zimmerman has finished or not, but we have finished, and we are now correlating our notes on that. I talked to Mr. Wooden about that. As far as the reading is concerned, we have finished our reading of the reports that were submitted to us.

Mr. Wooden: Do I understand also, Mr. Leisure, that you have already decided you are not going to ask for Mr. Bass?

Mr. Leisure: Yes, we have decided we will not. I have not talked to Mr. Zimmerman about that, however.

Mr. Wooden: You haven't reached a decision about Mr. Royal?

Mr. Leisure: We haven't reached a decision about Mr. Royal. We will endeavor to do that today. We are doing

some checking in regard to some of the statements
18786 contained in his reports.

Mr. Zimmerman: I will confer with Mr. Leisure this morning some time and advise you. I am sorry, but I have not undertaken to read in detail all of those documents and could not proceed to do so up to now, but the first thing I would like to do would be to see those exhibits that were offered yesterday, those P. C. A. exhibits, Portland Cement Association.

Mr. Wooden: I take it, as far as the interview reports are concerned, they have served their full purpose so far as inspection is concerned, and can now be returned to the files of the Commission unless in the event you call one of the men for cross, in which event they will be available again.

Mr. Leisure: That is quite right, Mr. Wooden, as far as we are concerned.

I haven't talked with Mr. Zimmerman.

Mr. Zimmerman: Just a moment, off the record.

Trial Examiner Norwood: Off the record.

(Mr. Zimmerman and Mr. Leisure confer.)

Trial Examiner Norwood: Back on the record.

Mr. Zimmerman: I will not take further time on the Bass and Royal reports beyond that which has already been taken.

As to what I may do with reference to cross-
18787 examination, I will inform you on that at the same time Mr. Leisure makes his final report.

Mr. Wooden: All right. I understand from Mr. Zimmerman's statement that he does not care to make any further inspection of the interview reports themselves.

Mr. Zimmerman: That is correct, Mr. Wooden.

Mr. Wooden: Merely to participate in any cross-examination in the event either of them are recalled.

Mr. Zimmerman: That is correct, yes.

Trial Examiner Norwood: On the record.

As to those papers you have there, Mr. Zimmerman, Commission's proffer, the papers marked for identification 2965 to 3007—

Mr. Zimmerman: Yes.

Trial Examiner Norwood: —if there are any of those that tend to establish the identity of the members of that Association, or the officers, they may be presented again.

That is, if it appears relevant, but otherwise I shall sustain the objection to them.

Mr. Zimmerman: That is in accordance with the rulings you made in Kansas City. I recall the same matter was up there and objections were made then as to
18788 relevancy and Your Honor then stated your position.

Mr. Wooden: Your Honor, I had hoped you would hear me a little on that before you made your ruling.

Trial Examiner Norwood: Well, both Counsel made statements yesterday about it. We had it up several times.

Mr. Wooden: Yes, but I merely made a short reply to the objections made by Counsel.

Mr. Zimmerman: I read quite a considerable reply by your associate, Mr. MacIntyre.

Mr. Wooden: But, in any event, I wish to note a special exception on the record to the ruling because I am convinced that this is one matter that I will have to take to the Commission.

Trial Examiner Norwood: I will take great pleasure in receiving anything the Commission desires. It will then be its responsibility.

Mr. Zimmerman: In view of the ruling, I think there is no necessity of my taking further time with these now. If you, at any time, re-offer these things, or any one of them, I shall then take time to look at them.

Trial Examiner Norwood: If Counsel makes clear as to those lists of members and officers—

Mr. Wooden: As a matter of fact, Your Honor—

Trial Examiner Norwood: —I do not recall that
18789 there was any testimony—well, there was some testimony regarding their attempts to standardize this product. So, if you will separate those from the others, and offer them, I think that I shall receive them; but the others, the letters regarding the dues, and the unwillingness of some members to stay in unless the others came in, and that action was based on their evident desire there that the other members of the industry bear their part of the expense—

Mr. Zimmerman: That is all.

Mr. Wooden: That is not all.

Trial Examiner Norwood: I cannot see that those letters mean anything else whatsoever.

Mr. Wooden: Does Your Honor care to hear me a little on that point?

Trial Examiner Norwood: Yes, go ahead.

Mr. Wooden: Of course, I think we might all start with the proposition, that all agree on the proposition, that a thing is relevant, or evidence is relevant, if it has a tendency to prove or disprove a given proposition, and also that a thing is relevant if it gives rise to any reasonable inference, or from which any reasonable inference may be drawn.

I would submit that in general the fact that certain things happened together in point of time, is some
18790 ground for an inference. We do not need to agree that the inference is overwhelming, or that it must carry conviction to every mind; but simply that it is a reasonable possible inference. You do not have to decide the weight of testimony in advance in order to see that it does have some bearing upon the subject.

Now, with those few general remarks out of the way—

Mr. Zimmerman: Yes—will you pardon me if I ask a question there?

Mr. Wooden: Yes.

Mr. Zimmerman: Would you like to be interrupted if we do not agree with your major premise?

Mr. Wooden: I do not know whether I would like it; I do not object.

Mr. Zimmerman: I mean to say, do you think it would be proper for us to call attention to it now?

Mr. Wooden: Just as you like.

Mr. Zimmerman: Well, I should say that I cannot agree with Counsel's foundational premise here; it does not conform at all to my understanding of the law of evidence. It is much too broad.

Mr. Wooden: Well—

Mr. Zimmerman: He says it is relevant if it tends to prove a given proposition. He leaves out entirely that the given proposition must be one of the material
18791 issues set forth in the pleadings.

Trial Examiner Norwood: I think that is implied.

Mr. Wooden: Yes.

Mr. Zimmerman: All right, then.

Mr. Wooden: Sure.

Mr. Zimmerman: Now, then, further than that, a reasonable inference is itself too broad. That must be stated in this way, it must be a reasonable inference which tends to support or prove a material point in issue.

Now, with that suggestion of change, Counsel may go ahead.

Trial Examiner Norwood: I think that was implied.

Mr. Zimmerman: That is not what he said; it may be what he meant.

Trial Examiner Norwood: Yes.

Mr. Wooden: Of course, I am not arguing about any proposition or given propositions that are not connected with the case.

Mr. Zimmerman: Yes.

Mr. Wooden: I made the general statement. I still think that that holds.

Mr. Zimmerman: All right.

Mr. Wooden: I grant you it has to have something to do with this case.

Mr. Zimmerman: Well, it is not just a mere
18792 something; it has to be a material issue set forth in the pleadings.

Trial Examiner Norwood: Well, I asked the Counsel yesterday to show me the materiality of any of those letters, and he has now started to do that, and I shall be glad for him to do that.

Mr. Wooden: Calling Your Honor's attention to Commission's Exhibit 2185, which is a letter by Mr. F. E. Tyler, of the Dewey Company, one of the companies involved in this pending correspondence, writing to his manager at Davenport, Iowa, referring to the chronic practice of the Marquette Company in making deals of 10 cents off, and also referred to the prices of cement at the time and said:

"It seems to me we should make no change for the present at least awaiting the results of the meeting in Chicago the 20th of this month, and if nothing is accomplished there I am certain inasmuch as a cut price is being made on all contracts, small and large, the general market will go down either 10, or 15, or 20 cents a barrel, and I mean by this practice all base prices."

And so on.

Now, Mr. Tyler testified—

18793 Trial Examiner Norwood: What was that date?

Mr. Wooden: That is August 13, 1931.

Trial Examiner Norwood: Yes.

Mr. Wooden: Now, at least one of the mills of the Dewey Company had resigned prior to that time. Mr.

Tyler testified that he attended that meeting in Chicago on the 20th of August, and that it was a meeting of the Portland Cement Association, and that he there discussed with other members of the industry some of these competitive conditions.

In Commission's Exhibit 2186, Mr. Capen, his manager of Davenport, replied to his letter—referring to the report of a meeting which he had received:

"And, of course, the news is disappointing that more was not accomplished"—

making certain comments on the situation.

Now, that meeting at Chicago on the 20th of August, 1931, was not the only meeting of the Portland Cement Association at which such things were discussed as competitive conditions, as shown by other evidence in the record. We have a number of references to things that were discussed between members of the industry at meetings of the Portland Cement Association that have to do with this case. I have in mind, for instance, the matter of the Cree, Indiana, Farm Bureau sales, that was dis-
18794 cussed in May, 1936, at a meeting of the Association.

Then we have in the record a letter of Mr. Charles Boettcher, Commission's Exhibit 2249, addressed to Mr. Rader of the Lehigh Company, and dated June 5, 1931, in which he asks him to take off the base, and see what could be done to take off the base at his Ada plant, and requests the privilege of putting our own base—on our own mill—on our mill.

18795 Trial Examiner Norwood: He was writing that for the Cement Association?

Mr. Wooden: He was writing that to Mr. Rader, the vice-president of the Lehigh Portland Cement Association.

Trial Examiner Norwood: What does that have to do with it?

Mr. Wooden: We will see in a minute.

On August 13, 1931, Mr. Sunderland writing Mr. Boettcher. That is just a week before this meeting of August 20 that Mr. Tyler attended, sends him a note which he had written Hiram, in this Exhibit 2257. Mr. Sunderland told Mr. Boettcher that Hiram had been delegated to try and get straightened out certain phases of the situation so far as their districts are concerned. He says:

"In the meantime, none of us will be paying additional dues which we all agree with you none of us should pay

unless and until the principle is recognized and each company has the exclusive right to determine its own maximum selling base price at its own mill."

Now those dues that are referred to there are dues in the Portland Cement Association.

The situation was that certain companies were refusing to pay dues in the Portland Cement Association
18796 until and unless they got this situation ironed out of allowing each mill to determine its own maximum price at the mill.

Trial Examiner Norwood: Pick up those letters and show me any one of them that strikes on that inference which you have pointed out is based on other testimony, exhibits and testimony.

Mr. Wooden: The facts are as shown by these pending exhibits that none of some four or five concerns would go back into the Portland Cement Association unless Marquette went in.

It was understood that Marquette would go in as of July 1, 1932. Apparently there was some delay about it and these people kept holding back until it was settled Marquette was going in.

Mr. Zimmerman: Are you reading from a letter, now?

Mr. Wooden: No.

Mr. Zimmerman: Oh, generalizing.

Mr. Wooden: These letters show it.

Trial Examiner Norwood. Just show me a letter that indicates that; that is, a letter that doesn't base this desire to have Marquette come in on something other than what you have said, there.

They may have done that and you may have
18797 shown it somewhere else, but do these letters strengthen that, or would they be of any value to the record?

Mr. Wooden: There is a letter, Exhibit 2971, a letter of Mr. Tyler.

Trial Examiner Norwood: What does that say that bears on the subject?

Mr. Zimmerman: That is number what?

Mr. Wooden: That is wrong. I will give you another one. The application of the Dewey Company itself, Exhibit 2965-A, dated July 15, shows it is based on the conditions in Mr. Tyler's letter of July 18, 1932, which is here.

Trial Examiner Norwood: I couldn't identify that, in there.

Mr. Wooden: Here is the letter of July 18, 1932; 2986; in which Mr. Tyler acknowledged the telegram showing Marquette and Hawkeye applications had been received and the Missouri application mailed that day.

Trial Examiner Norwood: I was mistaken. I have read that letter.

Mr. Wooden: And Tyler said that in attaching his application he wanted it understood that any of the companies controlling any of those plants, if any of them with-
18798 drew they should be immediately notified so it might have the privilege of withdrawing, itself.

Trial Examiner Norwood: Read further and get to his reasons, there.

Mr. Wooden: "I realize the above notice sounds a little raw but it is principally due to the experience with our Dewey mill making huge payments for approximately a year and a half while the Boettcher mill at Ada were paying nothing," and so on.

Trial Examiner Norwood: That shows that it refers solely to the subject of these companies bearing their share of these expenses and this association purported to be a gatherer of useful trade information.

Mr. Zimmerman: Yes; a kind of an organization that pushed the sale of Portland cement generally as against other competitive products.

Mr. Wooden: Are we to forget all that happened before this time and afterwards?

Mr. Zimmerman: Certainly not. I might add to it they conducted a research bureau and worked to the improvement of the product.

Trial Examiner Norwood: I am not saying that is a fact, but as far as those papers show.

Mr. Wooden: I am directing your attention to other matters.

18799 I started to say there was, apparently, some delay and still some uncertainty up to the 11th and 12th and even later, as to whether Marquette would come in.

Two members of the board of directors, Mr. Young and —the minutes will show—Mr. Young and Mr. Rader interviewed Mr. Dickinson of the Marquette Company on the 12th of July and reported that it had agreed to take membership effective July 1.

As a matter of fact, it was July 16 before Marquette finally indicated that it was making application.

There is a telegram among these papers which show the information being transmitted to another company that was holding back to the effect that Marquette, on that day, had telephoned it was sending its application.

You will find that the papers show some of the concerns were holding back until Marquette was actually in the hands of the Association, but, of course, the biggest fact is that on the very day that Marquette finally submitted its application and dated it back to the 1st of July it led off with an increase of 40 cents a barrel and the other concerns in the Portland Cement Association, competitors of Marquette, immediately followed it.

18800 Mr. Zimmerman: Where is the evidence of that statement you have just made?

Mr. Wooden: You will find it among the papers from the Universal-Atlas records showing the announcement sent out by the various companies, including Marquette.

Mr. Zimmerman: You couldn't cite the exhibit?

Mr. Wooden: I couldn't off-hand, no.

Mr. Zimmerman: That would only tend to prove that Marquette which had been selling cement at that time, in 1932, at a loss, finally saw a possibility of, having sold more than its entire productive capacity that year, saw the possibility, maybe, of getting a little better price out of which it may have been able to pay some dues in this Association.

Mr. Wooden: There is no evidence on that point.

Mr. Zimmerman: Oh, yes, there is.

Mr. Wooden: But I again call your Honor's attention to the way the circumstances fit together, there, and that these parties were in touch with each other on just a day or two before this action was taken.

I merely submit those things, taken together, form a ground for a reasonable inference that brings it clearly within the scope of what is relevant and 18801 material.

Trial Examiner Norwood: That is on the principle post hoc ergo propter hoc.

Mr. Wooden: Your Honor realizes the weakness of that particular thing standing alone. If I didn't have anything in this record other than the mere harmony in time, so to speak, I wouldn't have near as much as I have submitted there is in the record. It is not only that but these other things which I have directed your attention to.

Mr. Leisure: If your Honor pleases, when one gets

their mind too fixed on one point they are apt to slur over some very important things that change the entire picture when they see the other side and are not accustomed to dealing ex parte all the time.

Now Mr. Wooden treats this as though there was only one meeting, the membership and the meeting in August. As a matter of fact, the thing he is talking to Mr. Zimmerman about was something that happened in July.

The August meeting has nothing to do with the membership.

If you slur over those two dates and tie them together you can build the picture, but if you take the facts as they existed, it fades into thin air and I have no doubt Mr. Wooden overlooked those facts.

18802 Mr. Wooden: It is August of 1931, and July of 1932.

Mr. Zimmerman: There is only one point about that. Mr. Wooden has argued and assuming his argument is based on matters he can cite in the record, he indicates the previous year, I believe it was 1931, some of the companies said that "We will not be paying dues until we are all assured of an independent right, each mill have an independent right to fix its own prices."

Well, now, it would be presumed that when—

Trial Examiner Norwood: Is that in those—

Mr. Zimmerman: No.

Mr. Wooden: Yes, that is in evidence.

Mr. Zimmerman: It is not there at all.

Mr. Wooden: That is Exhibit 2257.

Mr. Zimmerman: If a year later they got back to the point where some of them began to pay dues, I should think Mr. Wooden could see that the inference would be was that it was because they were certainly assured of complete independence of action and that hardly tends to prove anything represensible with reference to any Respondent.

Trial Examiner Norwood: Wouldn't there be an implication, there, that prior to that time they did not have that freedom?

18803 Mr. Zimmerman: I don't think so. I think we have got—Marquette, certainly, apparently had complete freedom of action and have exercised it consistently and have been a little annoying about it at times, probably.

Trial Examiner Norwood: Do you connect that letter we have just been discussing with this Association?

Mr. Wooden: Oh, yes, your Honor.

Mr. Zimmerman: There is no reference.

Mr. Wooden: I may say—No. 2257.

Trial Examiner Norwood: Yes.

Mr. Wooden: It does not mention the Association by name, but 2258, which I am sorry to say is temporarily missing and which is enclosed with 2257, mentions the Portland Cement Association by initials, "P.C.A." It shows he is talking about dues and membership in the Portland Cement Association.

Mr. Zimmerman: This thing is in evidence so we are not arguing about whether this is admissible or not, this 2257, but we are wondering whether there is any possible connection that you have shown in any of these new exhibits and the thing which is not in evidence.

Trial Examiner Norwood: What is the other exhibit you refer to?

Mr. Wooden: 2185 and 2249.

Trial Examiner Norwood: The one that is missing?

18804 Mr. Wooden: 2258.

Trial Examiner Norwood: 2258?

Mr. Wooden: I may say, in that connection, Your Honor, that the record shows that I re-offered them at Kansas City, after you had admitted Commission's Exhibit 2257.

Trial Examiner Norwood: We received it, I think, after returning to Washington.

Mr. Wooden: Well, I have not been able to find any record of its receipt, as a matter of fact.

Of course, I am not trying to convince anybody that thus and thus is the exact meaning of all this chain of evidence; but I do say that there is sufficient shown to make these pending exhibits relevant and material, and that they may be considered along with other evidence as a ground for admission.

Mr. Zimmerman: Your Honor, I want to make a note of the pages of the record—

Mr. MacIntyre: Your Honor please—

Mr. Zimmerman: (Continuing) Page 13996, Kansas City proceedings, where an objection was made. Mr. Wooden asked about when Marquette became a member, or when it resigned from the P. C. A., and asked if we would find that out for him, and I said it is neither com-

petent, relevant, or material as to when prior to this
18805 witness' knowledge the Marquette Company be-
longed to some other organization, is not part of the proceedings at all.

The Examiner ruled: "I do not see the relevancy." It was argued at length. There were numerous objections and arguments made at that time. We did agree to find out, or make inquiry from the Portland Cement Association, as a matter of courtesy to Mr. Wooden, what date their records showed we had joined or rejoined in 1932.

We got a letter from them, and I gave Mr. Wooden a copy of it at that time.

Mr. Wooden: Yes, it showed they joined on July 1, 1932.

Mr. Zimmerman: Yes.

Mr. Wooden: Whereas, these pending exhibits show while it was effective July 1, the actual decision, the final decision, was made on July 16.

Mr. Zimmerman: Yes.

Mr. Wooden: The same date Marquette increased the price 40 cents a barrel.

Mr. Zimmerman: What difference does that make? That might have been the same day when we saw that possibility of obtaining enough money to enable us to endeeavor to pay some dues.

Mr. MacIntyre: Your Honor please, on this point of sequence that Mr. Leisure referred to a few moments
ago.
18806 I would like to call Your Honor's attention to one
of the facts involved. He spoke about a price advance, or someone joining an association, during July, and then during the following August another meeting was held, and in the meantime a price advance had gone into effect; but in this offer there is marked for identification Commission's Exhibit 3005-A, which is one page of the minutes of a meeting of the board of directors of the Portland Cement Association, open session July 11, 1932, adjourned session July 12, 1932.

Among those listed as present are Charles F. Conn, treasurer of that association. He is also a high official of The Cement Institute, president of the Giant Portland Cement Company, one of the Respondents in this case; Mr. F. L. Stone—

Mr. Leisure: He is not an official of The Cement Institute at that time, Mr. MacIntyre.

Mr. MacIntyre: Not president; not president.

Mr. Leisure: Not an official at that time. Your statement would indicate that he was.

Mr. MacIntyre: A committee member, a committee member of one of its committees.

Mr. Leisure: Well—

Mr. MacIntyre: The exhibits in the record are clear on that, Your Honor.

18807 Mr. F. L. Stone, proxy for B. S. Affleck, of the Universal-Atlas Cement Company, an official of The Cement Institute, and one of the—president of one of the Respondent companies here; and Mr. G. S. Brown, president of the Alpha Portland Cement Company, president of one of the Respondents here; Mr. Charles L. Hogan, then vice-president of the International Cement Corporation, which has later changed its name to the Lone Star Cement Corporation, one of the Respondents here, and he is at the present time a president of that Respendent; J. B. John, president of the Medusa Portland Cement Company, one of the Respondents here, and at that time an official of The Cement Institute; Morris Kind, president of the Hercules Portland Cement Company, a Respondent here; M. C. Monday, president of the Hermitage Portland Cement Company, one of the Respondents here, and also, for a long period of time, trustee of District 6 of The Cement Institute; Blaine S. Smith, one of the organizers of The Cement Institute, president of the Penn-Dixie Cement Corporation, a Respondent here.

Mr. Zimmerman: Is it necessary to spread this on the record?

Trial Examiner Norwood: Let Counsel finish his statement?

18808 Mr. MacIntyre: Mr. L. T. Sunderland, president of the Ash Grove Lime & Cement Company, one of the Respondents here, also, for a long period of time, one of the high officials and member of committees, and member of the board of trustees of The Cement Institute; Mr. J. S. Young, president of the Lehigh Portland Cement Company, at numerous times chairman of different committees of The Cement Institute, and a member of its board of trustees.

Now, if Your Honor please, with that group of men meet-

ing five days before they announced a price advance, discussing that certain matters must be cleaned up of a competitive character, before the Marquette Cement Manufacturing Company would become again a member of the Portland Cement Association, and the facts as disclosed in these exhibits, to the effect that the Marquette did become a member of The Cement Association, dating its membership 12 days in advance, dating it back to July 1, 12 days in advance of this particular meeting, is a chain of circumstances that Mr. Leisure did not call to Your Honor's attention when he attempted to say that the meeting—I mean, the meeting was in August, as Mr. Wooden has referred to, and then a price advance had taken place some thirty or forty days prior.

The fact is that the record shows in this offered exhibit that the meeting took place five days before the advance
of 40 cents per barrel by all of those manufacturers
18809 whose representatives sat in at the meeting.

That is one fact that we ought not to overlook.

Mr. Leisure: Now, Mr. MacIntyre's statement relates that he has made a great discovery. He has made a great discovery that all of the men who attended a Cement Association meeting were cement men. That is what that amounts to.

There is no connection whatever between the price advance as shown on these exhibits. It is just fighting with fancy. It does not prove or tend to prove anything.

Trial Examiner Norwood: Well, I think that it might be some grounds, for instance—

Mr. Zimmerman: May I say—

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: I would say that Your Honor's point is pretty sound, if it were not based upon the thoroughly imaginary statements that have been offered by Mr. MacIntyre.

Mr. MacIntyre assumes things which are not in evidence, and concerning which he would dream out what, in his opinion, must have happened; but which, unfortunately, are not supported by any evidence at all.

He even goes so far as to tell you what these people talked about, and he refers to a meeting in August, says
that Mr. Wooden referred to it, and, as Mr. Wooden
18810 told you, the meeting in August that he was referring to was—

Mr. Wooden: August, 1931.

Mr. Zimmerman: —was the year previous.

Mr. Wooden: Yes.

Mr. Zimmerman: 1931, not even the same year that Mr. MacIntyre is referring to.

Mr. Wooden: He is talking about a meeting in July.

Mr. Zimmerman: I know, and you were talking about a meeting in August, 1931.

Mr. Wooden: I was talking about both.

Mr. Zimmerman: Now, you did not even mention any other meeting than August, 1931.

Mr. Wooden: I did, I mentioned the one in 1932.

Mr. Zimmerman: I don't know, but Mr. MacIntyre is now mentioning about one he supposed took place in August, 1932.

Mr. MacIntyre: No.

Mr. Zimmerman: (Continuing) And going ahead and imagining all the things he talked about.

Trial Examiner Norwood: I shall ask Mr. MacIntyre to give me as many references as he can on which he bases his statement there, and we have just had a full discussion of the matter, and I will take the exhibits and make a study of our discussions this morning.

Give me your references and read them into the record.

Mr. MacIntyre: Well, if Your Honor please, I
18811 would much prefer that you disregard everything that I have said, and anything that Mr. Zimmerman has said, as to what these exhibits show on their face, and look to the exhibits for the precise showing of what took place at these meetings, and as to what they did discuss.

I do not propose to attempt to urge upon you that they did discuss something that the exhibits themselves do not show was discussed.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Or that the people themselves did not represent whom the record shows they represent.

I would much prefer that you look to the record for that.

Now, as to the references that you have spoken about, I refer to this pending offer as one group of exhibits that you should consider as to what was taking place within that five-day period, when these meetings were being held, when they were joining the Association, dating their membership back as of July 1, although they were coming in within five days of this 40-cent price advance.

I call your attention to that group of exhibits on those facts.

As to the price advance itself, we again refer to that group of exhibits in the form of price quotations
18812 sent out by these companies, to which Mr. Wooden has referred.

Mr. Zimmerman: What was that?

Mr. MacIntyre: They were offered in Chicago, and I believe they numbered something like 100. They are photostats of the price advances.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I secured them from Mr. F. L. Stone of the Universal-Atlas Cement Company in Chicago at the time that I investigated their files. They were offered there, and I believe that Mr. Hershberger stipulated as to the authenticity of their being records taken by me from the Universal-Atlas Cement files.

Mr. Wooden: Mr. Conoghan.

Mr. MacIntyre: Mr. Conaghan, I believe, was the one instead of Mr. Hershberger.

There are about the number of 2100. I will have to give you the exact numbers, there are so many of them, at some later hour. I cannot recall all of them at this moment.

As to the representatives of these companies being the representatives of other companies, of which I have mentioned, I only refer to the Commission's Exhibits 136 and 137, being in the form of minutes of meetings of The Ce-
ment Institute showing who were present, and
18813 whom they represented at those meetings.

Mr. Wooden: I merely wish to say, Your Honor, that in my judgment the pending Commission's Exhibits 2965 to 3007, coupled with other exhibits and testimony in the record, do more than merely show a certain sequence of events, and that taking those things together they constitute a line of evidence which, in my judgment, would be received in any criminal case involving the life or liberty of any individual.

That, in my judgment, is briefly how relevant and competent and material they are.

Mr. Zimmerman: Now—

Trial Examiner Norwood: Well, I want to study this Commission's Exhibit 2258,—and what was the other exhibit that you said was relevant there?

Mr. Wooden: 2185—2257.

Trial Examiner Norwood: 2185?
Mr. Wooden: Yes. And 22—
Trial Examiner Norwood: and 2257?
Mr. Wooden: And 2249, and the testimony of Mr. Tyler on page 14332, and running over to—it will run over probably to 14350—14350, I think that is it.
Trial Examiner Norwood: I shall study those in view of all the circumstances here; I think the thing should receive consideration, that is a basis for any infer-
18814 ence however slight.
Go ahead.
Mr. Wooden: I should like to ask at this time whether Mr. Zimmerman is ready to give an answer to the proposed stipulation—
Mr. Zimmerman: Yes.
Mr. Wooden: —regarding the—
Mr. Zimmerman: Yes, I am quite ready.
Mr. Wooden: —the identity of certain exhibits.
Mr. Zimmerman: Quite ready to do so.
Mr. Wooden: Exhibits 2604, 5, and 6, I believe.
Mr. Zimmerman: Yes.
Trial Examiner Norwood: Will you please let me have Exhibits 2604, 5, and 6, and 7.
(Mr. Bonds hands exhibits to the Trial Examiner.)
Trial Examiner Norwood: Thank you.
Mr. Zimmerman: At record page 18725, Mr. Wooden suggested for my consideration a stipulation as to what one Harold W. Bangert and one Elizabeth Carroll, C-a-r-r-o-l-l, would testify to if called as witnesses.
Now, I regret that I will be unable to so stipulate, and I think it only fair to both sides that I state why I will be unable to so stipulate.
The Commission's exhibits referred to are 2604-A to F, 2605-A to E, and 2606.
18815 It appears that at Kansas City some questions were asked of Mr. Wecker, president of the Marquette Company, concerning those exhibits, first at record page 13974. Mr. Wecker was shown Commission's Exhibit 2604-A to F, which Mr. Wooden described as tabulations of bid prices, or bids, on Illinois Highway Department for April 12, 1933, and asked whether or not he had not prepared those, or given them to Mr. C. M. Johnson, in 1933, and he was asked similar questions about the other exhibits. He replied that he did not have any such recollection.

Mr. Wooden asked me to look into the Marquette Company's files to see what the facts were, and I reported to him accordingly that we could find no information in the files which indicated that those things had been so produced.

Some time in March, 1939, the matter again came up. I was then asked to stipulate in substance that if Mr. Johnson were called he would testify, in substance, that he received them from Mr. Wecker, and it appeared that when Mr. Johnson was called we did not stipulate, he testified that he had not received them from Mr. Wecker, that the initials "C. M. J.," in the upper righthand corner, indicating that he had received them on the 12th of July, 1933, were not in his handwriting, and he had not any knowledge of how they got there.

18816 On that same day Mr. MacIntyre then asked me to stipulate that a certain Miss Cady, C-a-d-y, in the Chicago office of the Federal Trade Commission, had received them. I could not do that because they were not ever sure—

Mr. MacIntyre: Your Honor please—

Mr. Zimmerman: (Continuing) —as to whether Miss Cady—

Trial Examiner Norwood: Wait a moment.

Mr. MacIntyre: May I ask Mr. Zimmerman—

Mr. Zimmerman: (Resuming) —had or would so testify—.

Mr. MacIntyre: May I interrupt Mr. Zimmerman at that point.

Mr. Zimmerman: Better wait until I get through, I think.

Trial Examiner Norwood: Let us see what Counsel has to say, I think that is the best way.

Mr. MacIntyre: I do want—.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: Then we agreed that each of us—

Trial Examiner Norwood: Go ahead, Mr. MacIntyre.

Mr. MacIntyre: I just want to say that I never asked Mr. Zimmerman to stipulate that Miss Cady did anything. I did make a statement, whether it was on the rec-

18817 ord or off I do not recall, that it was our thought that probably Miss Cady had placed her handwriting on those exhibits, but I never asked Mr. Zimmerman to stipulate anything in that respect.

Trial Examiner Norwood: Go ahead, Mr. Zimmerman.

Mr. Zimmerman: Then we agreed that we would make again an independent investigation, exchange information during the recess, and see whether or not that there was something that we could agree upon.

I went ahead and carried out my part of the bargain, and advised Mr. Wooden exactly what I had been able to learn.

Mr. Wooden: Now, Mr. Zimmerman, do you mean to imply that I did not carry out my part of a bargain?

Mr. Zimmerman: Well, now, if one—

Mr. Wooden: I want to know.

Mr. Zimmerman: If and when I am able to make a statement without interruption—

Mr. Wooden: Go ahead, go ahead.

Mr. Zimmerman: I will proceed, but I will not proceed any further with constant interruptions.

Mr. Wooden: Go ahead.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: I have here in the file before me this telegram from Mr. Wooden:

18818. "My understanding was"—

—this is addressed to me under date of March 15—

"—you would make independent effort at Marquette office and each of us would notify the other of results. Inquiry already under way to ascertain information described in your telegram but the report not yet received. Will you please ascertain whether copies of exhibits are in any Marquette files or whether someone there can identify copies."

That was after I had notified him that I understood that he was to let me know what investigation he had been able to make, and we were to exchange information, and that is exactly what was agreed upon.

It was not until after I got back here, and after that recess, that I again was approached by Mr. Wooden, and this time called my attention to some correspondence which he had had with Mr. John Bass under date of March 17—

Mr. Wooden: I never had any correspondence with John Bass. You are referring to a report made by John Bass in response—

Mr. Zimmerman: Oh, all right.

Mr. Wooden: —to the Association—

Mr. Zimmerman: Oh, go ahead. I am not going
18819 to make any further statement on this—

Mr. Wooden: You seem determined to make statements that are not accurate, and I just cannot—

Mr. Zimmerman: I haven't anything further to say. If I cannot proceed without interruption, I will make no further statement.

Trial Examiner Norwood: Counsel may proceed, and I shall ask Counsel for the Commission to wait and make their reply to anything they may consider prejudicial.

Mr. Wooden: All right.

Mr. Zimmerman: The best you can say about this whole situation is that they are asking a favor, and they are doing it with very poor grace.

I was furnished an opportunity to glance over letters of what appeared to be some original documents. Then I was handed some typewritten copies of those things. Among them was a memorandum which seemed to be dated 3-17-39, seems to be signed John H. Bass, attorney-examiner.

18820 Mr. Wooden: Do you want to look at the originals. They are here.

Mr. Zimmerman: If it is just impossible for you to contain yourself, you go ahead.

Mr. Wooden: I will try my best.

Mr. Zimmerman: Thanks. Do your best.

That copy says, here: "In compliance with a memorandum from Chief Counsel, dated March 13, 1939, the Examiner has made an effort to identify said exhibits attached to certain memoranda, No. G.H.I., with the following result:

"The writing in longhand appearing in the right hand corner is that of Miss Elizabeth Carroll of the Chicago office."

There is no statement here whatever made by Miss Carroll except that the party asked is here quoted as saying "Miss Carroll has no independent recollection of marking these three exhibits. Her best guess is that in order to expedite the transmission of this case she numbered the exhibits," and so forth.

I am invited to stipulate on somebody's testimony where they have no independent recollection and are making their best guess.

I shall not make any stipulations upon that kind
18821 of facts.

Then he goes on and refers to a statement made by Mr. Harold Bangert.

Trial Examiner Norwood: I don't see that we need go into this length, because the Counsel is within his right to refuse to make any stipulation.

Mr. Wooden: That is all I want to know.

Trial Examiner Norwood: And after the statement and reason, if that appears good to himself and for the best interests of his client, he does it, I don't think his motive would be impugned.

Mr. Zimmerman: I merely want to add there is also a memorandum apparently signed in Mr. Johnston's name by "H. B." which, I assume is Harold Bangert, refers to Exhibit F, G, H, I,—I haven't seen Exhibit F; don't know what it is and I should like to see it.

Mr. Wooden: You can.

Mr. Zimmerman: In other words, I do not have the complete statement of facts which would justify me making any stipulation.

The facts as given me so far are not in accordance with the proposed stipulation.

Le me see the F, a minute.

Mr. Wooden: There is F (handing document to
18822 Mr. Zimmerman).

Mr. Zimmerman: That doesn't seem to be related in any way to that, does it?

Mr. Wooden: It is Marquette material. You can recognize that.

Mr. Zimmerman: I don't recognize anything of the kind. In fact I am quite unable to recognize any of this stuff as Marquette material.

Mr. Wooden: I didn't propose to offer it. It is just for your satisfaction.

Mr. Zimmerman: And it appears that the whole thing has been based upon persons signing other person's names and initials in such a devious manner it is impossible to tell what the facts are and the truth is.

Mr. Wooden: Your Honor, ordinarily I wouldn't say anything. I would simply accept the decision of Mr. Zimmerman and proceed to call necessary witnesses, which will be done, but I do resent any implication that he car-

ried out his part of an understanding and that I refused to carry out mine.

The telegram I read shows that the inquiry, however, was under way, and I couldn't give him any information until it was completed.

The information which I gave him the first day after the hearing convened showed the originals of the
18823 reports were received after the date and even some of the reports were dated after the time I sent him the telegram and I gave him the originals and substituted copies the same day.

He has had the copies in his possession a week or more.

I don't think I care to say anything further but Mr. Zimmerman is just taking an attitude which requires unnecessary time and expense, but we will do it.

Mr. Wooden: I would like to ask Mr. Zimmerman at this time whether he has yet available for production the data that was requested in Kansas City of Mr. Wecker regarding shipments by or for account of other mills.

Mr. Zimmerman: Well, to some extent I can make a reply to that.

18824 Mr. Zimmerman: I was about to respond to Mr. Wooden's query there were numerous or a number, at least, of requests made by Mr. Wooden.

Amongst others I observe at page 14033 he asked that we provide a statement showing companies and mills which shipped for Marquette on the Illinois Highway Commission business of 1933.

I have looked into that and there were none.

Whatever Mr. Wecker's recollection was on that and as he stated it, by looking into the facts we find that there were no such thing at all, in 1933.

I did receive, yesterday, I think, a complete set of memoranda on the whole subject which will enable me by tomorrow morning to make a very complete and thorough answer to every inquiry made by Mr. Wooden at the Kansas City hearing concerning those matters.

I am sorry that I was not in the position to get it collated last night.

18825 E. V. JOHNSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. MacIntyre.*

I am Secretary of Fries, Bell & Sharp Company building supply dealers, (18826) located in Washington, D. C. In connection with its building supply business, the company handled Portland cement during the years 1929, 1930, 1931 and 1932.

18826 Q. What brand of cement did it handle?

A. Quite a few.

Q. What were some of them?

A. I don't know whether it was Atlas or Universal-Atlas, at that time; Security or North American; Lehigh; Alpha; Lone Star; some Penn-Dixie; Medusa; Allentown, in the old days; West Penn.

Q. Did you handle the Capitol brand?

A. Yes.

I don't know the dates, though; I don't recall when they came in.

Q. Who manufactures that brand?

A. The Standard Lime & Stone Company.

Q. Of where?

A. The main office is in Baltimore; the plant is in

18827 Martinsburg, West Virginia.

Q. Mr. Johnson, are you concerned and head of a membership of any dealer trade association?

A. I used to belong to the old National Building Supply Association.

Q. Were you a member of any local group?

A. There have been local groups here, I guess, for 40 years and at times we have attended the meetings and at times we have not. They are largely a matter of credit matters.

Q. Was it during the period of 1929 to 1932 you were a member of any local group?

18828 A. We have been members of a local group of dealers.

18829 I might add we cover a great many fields beside the material under inquiry and we are probably members of a dozen local associations including what is

known here usually as building supplies, hard materials, fireproof materials.

By Mr. MacIntyre:

Q. Did you at any time have a position as an officer of any of those associations?

A. I don't recall that I have.

Q. What can you say with regard to the National Association of which your firm was a member; that is, as to being an officer of any local unit of that Association?

A. I don't recall that I ever was an officer of the National Builders Supply.

I attended their convention once a year, that was about the extent of my activities.

By Mr. MacIntyre:

Q. Who was president of that Association at the time you attended the convention?

A. I really don't recall.

Q. Mr. W. W. Campbell?

18830 A. Campbell was at one time and Jencke, Mr. Walter Jencke.

Q. Mr. Johnson, isn't it a fact you were a secretary of the local Building Supply Dealer Association during this period, 1929 to 1932?

A. It is possible, but I have no recollection of being so.

If I may make a statement, our firm dropped out of all activities with the exception of the National Creditmen's Association, here, for several years, until the N. R. A. came in and we were practically forced back into the associations.

By Mr. MacIntyre:

Q. Mr. Johnson, will you please state whether or not you have, during any of that period of 1929 to 1932, attended meetings or held conferences with cement manufacturers or representatives of manufacturing concerns relative to their method of distributing cement in Washington, D. C.?

A. Not with manufacturers as a group. I undoubtedly have talked to the individual manufacturers on many occasions.

Q. Will you please explain what you mean by that?

A. Well, it is my belief in my contact with the manu-

facturers that as a group they would not discuss the question with us.

18831 Q. Will you please name the individuals with whom you had such conferences?

A. Well, I will try to think back of different ones that I know.

The officials of Universal-Atlas, Mr. MacIntyre of the Philadelphia office was in New York. Mr. Stone.

Q. Mr. F. L. Stone?

A. Vice-president. Mr. Kelly, one time.

In the Lehigh Company, Mr. Swett, Mr. Bohen, possibly others.

In North American, with both Mr. Porter and Mr. Hart, quite frequently.

The Capitol, the Standard Lime & Stone, with several of the owners of the business, the Bakers and their sales representatives.

Q. What about the Lone Star Cement Company?

A. I talked at various times with Mr. Coe and Mr. Hogan and Mr. Neylan and possibly their local representatives.

Q. Mr. Johnson, can you recall the details of the meeting that you had with those representatives in the Pennsylvania Hotel in New York?

18832 A. I never attended any meeting with anybody in the Pennsylvania Hotel.

I never was in there but once in my life.

By Mr. MacIntyre:

Q. Mr. Johnson, don't you recall having stated to a special agent of the Department of Justice and also to me during November, 1932, that you had, on a number of occasions, attended meetings with the cement manufacturers in the Pennsylvania Hotel in New York City?

A. Absolutely not, sir.

If I may make a statement, I attended a meeting in the Commodore Hotel in New York—I don't know what year—at which several of the gentlemen were present that I mentioned; Mr. Swett and Mr. Coe were present and numerous others that I probably could remember.

I went up there with one or two local dealers.

The various dealers wrote ahead to their cement connections and asked them to meet us at the Commodore Hotel and most of us, being good customers, they met us

and absolutely refused to discuss the marketing of cement.

18833 I don't even recall the detail of what we went up there for, but I know that—what we went for was afterwards straightened out, but they wouldn't discuss it with us.

18834 Q. Mr. Johnson, didn't you tell me during November, 1932, that you did go to New York on that occasion to discuss with these cement manufacturers the problem of them eliminating the arbitrary price set-up in Washington, D. C., and putting it back on the basing-point system?

A. I have no recollection that that was what we went for. I will state that it was very probably that; that we did. We were vitally interested in it.

By Mr. MacIntyre:

Q. Mr. Johnson, don't you recall having, a few months after that—that is, during the latter part of 1932—having told me and also having told a special representative 18835 of the Department of Justice that that is the purpose that you went to New York and that you did discuss with these gentlemen you named that problem and that it was cleaned up shortly after?

A. No, sir: I have no recollection of telling you that, and if I did it was an error because we never discussed, in a group of dealers and of manufacturers, those questions. I have never been present at such a meeting.

Trial Examiner Norwood: Did you discuss it with any of these gentlemen you speak of?

The Witness: Individually?

Trial Examiner Norwood: Yes.

The Witness: Yes, I did; numerous times.

By Mr. MacIntyre:

Q. What was the thing you said was cleaned up?

A. I stated I didn't know why a number of the local dealers went to the Commodore Hotel; I have no recollection what the purpose was, but I have a very clear recollection they refused to discuss it, whatever it was.

Q. You stated shortly thereafter it was cleaned up.

A. I have a recollection, through some method, the condition was cleaned up.

Q. What was the condition?

A. I don't know.

Q. Wasn't it a matter of eliminating the arbitrary price system of the Lehigh Company, the price announce-
18836 ment, which was followed within two or three days by all the other manufacturers?

A. I don't know what the price announcement was. What was the price announcement?

Q. The elimination of the arbitrary prices in Washington, D. C., and putting the prices back on the basing-point system.

A. So far as I know, they have never been eliminated; still arbitrary prices, here.

Q. You don't mean to say they were not temporarily eliminated during 1932, do you?

A. I don't know. I don't recall.

Q. Mr. Johnson, will you state if you know the basis for the price in Washington, D. C., during the latter part of 1931? At to whether it was based on any nearby or distant mill?

A. I can't give you that information from recollection, any of those figures, Mr. MacIntyre. I don't know. I don't know what the basis is today.

Q. Don't you recall having told me during November, 1932, that for a time during the latter part of 1931 that the Washington, D. C., price was based on 95 cents, Cleveland, Ohio, base?

A. No, I never told you that way, and I have no recollection of these years.

I do know that at one time I satisfied myself that
18837 Washington was on an Ohio base. You say it is on a Cleveland base. There is no mill at Cleveland, there are silos there; it is just possible it is so, but I don't have any recollection as to that fact.

Q. I am just asking you whether you didn't tell me, during 1932, it was on a Cleveland base during the latter part of 1931?

A. I can't make a definite statement. I think it is possible, but I have no definite recollection with one exception; there was a time it was base at Cleveland.

Q. But you don't recall the precise dates?

A. No; I don't recall the precise date.

Q. Mr. Johnson, I believe that you stated that you and some of the other dealers did go to this appointment with cement manufacturers and representatives at the Hotel Commodore in New York?

A. That is right.

Q. And you did state that some condition was cleared up but you can't recall what was discussed with them that was cleared up?

A. No, I can't.

Mr. Leisure: He didn't say anything was cleared up, there, though. That is not correctly stating the record.

By Mr. MacIntyre:

18838 Q. Will you please state if you can, Mr. Johnson, the date of that meeting?

A. No, sir; I cannot.

Q. Will you give us the approximate date.

A. No; it has been a good many years ago and I don't recall.

Q. As to the clearing up of this condition, can you tell us how long after the meeting it was that the condition was cleared up that you have referred to?

A. Well—

18839 Q. That you refer to.

A. No, Mr. MacIntyre, the only recollection I have is a group of Washington dealers felt aggrieved at some condition of their business being hurt. We wrote to our connections and asked them to meet us in the Commodore Hotel a certain day.

Q. That is in New York.

A. That is in New York.

Several of us went up there. These companies that we did business with met us at the hotel, came to our rooms, and we endeavored to discuss this situation. They told us, frankly, that they would not discuss it with us, and we felt a little bit peeved.

We afterwards separated. We talked to possibly others. I know I talked to the Universal-Atlas people at that time, or possibly the Atlas Company it was, I think it was that far back, and felt rather peeved that they would not go into it.

They told us that it was against their policy to discuss with either their competitors or groups of dealers this type of question, relating to prices and distribution of cement.

The group of us came back to Washington that night on the train. They all had had the same reception; but I do recall that whatever it was was shortly cleared up,

18840 and we wondered how it got cleared up.

Now, if that is the testimony you want me to make,—we wondered, but we did not know.

Q. In what manner were dealers being hurt by the condition that you have referred to?

A. I don't recall what it was, Mr. MacIntyre.

Q. You do not recall in what manner?

A. No.

Q. —that you and the other dealers were being hurt by the condition?

A. No, sir; I do not. I know there had been a lot of conditions in selling cement in the last 30 years.

Q. Would low arbitrary prices in Washington, D. C., have injured the dealers?

A. No, sir.

Q. Would sales to trucks by the Lone Star Company from its Georgetown silo have injured the dealers' business?

A. Yes, sir; the warehouse condition in Washington put the dealers out of business, as far as that goes.

18841 Q. In what manner did it do that?

A. Well, the manufacturers were performing practically all the functions of a dealer, without making a charge for it.

Q. What effect, if any, did that have upon the price of cement as paid by the consumer?

A. Well, I couldn't answer that.

Q. Well, is it higher or lower?

A. I don't know. It depends upon what point you start from. We have an arbitrary price in Washington today. We don't know where the mills account for their costs.

Q. You have been unable to give us the date, the precise date, of this meeting at the Commodore Hotel in New York, Mr. Johnson.

Will you please state whether or not it was during the depression years, say 1931 or 1932?

A. I have no recollection, Mr. MacIntyre. The thing—the only way I fix it in my mind, is the fact that this group of dealers attempted to discuss a question, and their good friends with whom we dealt refused to talk to us.

Trial Examiner Norwood: Now, what was that question?

The Witness: I do not recall, sir, it was something relating to the marketing of cement.

By Mr. MacIntyre:

Q. You cannot even recall whether it was 1931 or 1932?

18843 Q. And you are not certain of any date earlier than in just May, 1931—or 1932?

A. No, it might have been anywhere from 1929 to 1933 or 1934.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Examine him.

18844 Mr. Leisure: No questions.

Mr. Zimmerman: Nothing.

18846 (COM. EXS. 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991-A, 1991-B, 1991-C, 1991-D, 1991-E, 1991-F, 1991-G, 1991-H, 1991-I, 1991-J, 1991-K, 1992, 1993, 1994, 1995, 1996, 1997-A, 1997-B, 1997-C, 1997-D, 1997-E, 1997-E, 1997-G, 1997-H, 1997-I, 1997-J, 1997-K, 1998, 1999, 2000, 2001, 2002, 2003-A, 2003-B, 2003-C, 2003-D, 2003-E, 2003-F, 2003-G, 2003-H, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023-A, 2023-B, 2023-C, 2023-D, 2024, 2025-A, 2025-B, 2025-C, 2025-D, 2025-E, 2025-F, 2025-G, 2026, 2027-A, 2027-B, 2028-A, 2028-B, 2029, 2030, 2031, 2032-A, 2032-B,

18847 2032-C, 2032-D, 2033, 2034, 2035, 2036-A, 2036-B, 2036-C, 2036-D, 2037, 2038, 2039-A, 2039-B, 2039-C, 2039-D, 2040-A, 2040-B, 2040-C, 2040-D, 2040-E, 2041-A, 2041-B, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049-A, 2049-B, 2049C, 2049-D, 2049-E, 2049-F, 2049-G, 2049-H, 2050, 2051-A, 2051-B, 2051-C, 2051-D, 2051-E, 2051-F, 2051-G, 2052, 2053, 2054A, 2054-B, 2055-A, 2055-B, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063-A, 2063-B, 2063-C, 2064, 2065, 2066-A, 2066-B, 2067, 2068, 2069-A, 2069-B, 2070, 2071-A, 2071-B, 2071-C, 2072, 2073, 2074, 2075-A, 2075-B, 2075-C, 2075-D, 2075-E, 2075-F, 2075-G, 2076, 2077, 2078, 2079-A, 2079-B, 2079-C, 2079-D, 2079-E, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091-A, 2091-B, 2092, 2093, 2094-A, 2094-B, 2095, 2096-A, 2096-B, 2096-C, 2096-D, 2096-E, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110-A, 2110-B, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123-A, 2123-B, 2123-C, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, were offered and received in evidence.)

Mr. Wooden: Your Honor has received in evidence Commission's Exhibits 585-F and G.

At the time I offered it, I did not clearly understand just how it came into our possession beyond that it
18848 was produced under the subpoena duces tecum of January, 1938.

I now have a paper which was marked for identification as Commission's Exhibit 585-E, and which was also produced under that subpoena by the International or Lone Star Cement Corporation.

I offer this Commission's Exhibit 585-E as a photostat of an original letter to C. L. Hogan of the International Cement Corporation, which accounts for and evidently transmits the exhibit which I offered, and which was received as Commission's Exhibits 585-F and G.

I offer at this time Commission's Exhibit 585-E (handing document to Mr. Leisure).

Trial Examiner Norwood: On the record.

Does the letter of transmittal add further to the identification?

Mr. Wooden: Yes, Your Honor, that makes reference, I think, to Commission's Exhibits 585-F and G.

18849 Mr. Leisure: Mr. Wooden, do you know how it is that there is writing on this exhibit? Do you identify that in any way?

Mr. Wooden: No, I do not.

Mr. Leisure: You do not offer the handwriting?

Mr. Wooden: No, I do not. I infer it was put there by someone in the office of the recipient, part of their files. It means nothing to me,—just a matter of inference.

Mr. Leisure: Your Honor pleases, it is only two lines,—it says: "I am enclosing herewith copy of letter which I have written to Mr. Charles S. Conn, president of the Cement Institute."

That is the entire letter.

Now, until I see the letter it referred to, I do not know whether I have an objection to it or not. I would like to see ~~that~~ exhibit, though.

18850 Mr. Wooden: Your Honor, at this time I offer papers marked for identification as Commission's Exhibits 3047-A and B, and consisting of an original letter purporting to be signed by Charles L. Hogan, vice-president of the International Cement Corporation, including a freight rate book, and in that same connection I offer the freight rate book which has been marked for

identification Commission's Exhibit 2849, and which was given that number at the time Mr. Reiter referred to the publication of the freight rate book by the Nazareth Traffic Bureau.

This exhibit 2849 is the publication of the Nazareth Traffic Bureau (handing exhibit to Mr. Leisure).

I am offering those without further identification in the expectation that no further identification will be required.

18851 Trial Examiner Norwood: Well, do you question the identity of the book?

Mr. Leisure: No, I do not know whether it is or not—I cannot identify it, because I do not know anything about it, and I do not have anything to do with the Nazareth Traffic Bureau, never have represented them, do not represent them.

18852 Mr. Wooden: You asked Mr. Reiter something about it.

Mr. Leisure: The whole thing is so remote and does not prove or tend to prove any of the issues in the case.

I object to them as incompetent, irrelevant, and immaterial.

Mr. Zimmerman: I think, that Your Honor will want to know what this is about (handing document to the Trial Examiner).

Mr. Wooden: I think that Mr. Reiter testified it was a bureau composed of small cement manufacturers in the Lehigh Valley, if I am not mistaken, or somewhere in that general section.

Mr. Zimmerman: It might be that Mr. Wooden could make such an offer of proof as would enlighten us further on the subject.

Trial Examiner Norwood: Yes. What is this offered to show?

Mr. Wooden: To show, Your Honor, that the freight service involved there was confined to certain basing points, and not to shipping points as such.

Mr. Leisure: Well, assume that it were, it has nothing to do with the issues in this case. There is nothing that that traffic bureau could do that would bind any of the Respondents in this case.

18853 Mr. Paulson: Your Honor, the cement industry has never been without freight rate service from the time it went on the delivered price basis until the

present time, and, I think that to get a correct perspective of the freight rate service as it is engaged in today we should review the history of concerted action over freight rates in the cement industry.

18854 The exhibit just offered illustrates the type of service rendered at one period in the history of the cement industry.

I think that in Kansas City we had testimony showing operation of freight rate service out in that section of the country, and we have also had other testimony on the matter, which tends to illustrate how freight rate service bears upon the pricing methods in this industry, which are the heart of count 1.

Mr. Zimmerman: Might I ask a question?

Trial Examiner Norwood: Yes.

Mr. Paulson: Will be glad to have it.

Mr. Zimmerman: This letter that is before the Examiner now is not what you understand to be a sort of co-operative traffic department that was operated jointly by some companies in a certain district as of that time back there in 1928?

Mr. Paulson: I understand that this is illustrative of the fact that the cement companies have always received freight rates from a central source, that there has always been concerted activity in the procurement of freights.

Mr. Zimmerman: You do not quite answer my question.

Mr. Paulson: Not quite, no; I understand—

Mr. Zimmerman: Yes.

18855 Mr. Paulson: In direct answer to your question, I will have to refresh my memory.

Mr. Zimmerman: Yes.

Mr. Paulson: I have not had this in my hands only just this morning (examining exhibit in question).

Mr. Zimmerman: Yes.

Mr. Paulson: Well, in direct answer to your question, I would say that the Nazareth Traffic Bureau was operated and sold a service to the companies. I believe that is my best recollection offhand.

Mr. Wooden: That is my understanding of Mr. Reiter's testimony.

Mr. Paulson: Yes, it was operated, not necessarily by the cement industry, or any members of the cement industry, through a trade association, but perhaps—and I

believe the testimony is—that it was operated by an individual, and that they subscribed to the service.

Mr. Zimmerman: I see.

Mr. Paulson: I would want to verify that.

Trial Examiner Norwood: And the Respondents—

Mr. Paulson: That makes no difference.

Pardon me, Your Honor.

Mr. Zimmerman: Of course not.

Mr. Paulson: So far as the relevancy of this is 18856 concerned.

The point that the Commission is attempting to show that the industry always receives its freight rates from a common source.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: Well, of course—

Mr. Paulson: Always does.

Mr. Zimmerman: Of course it would not tend to do that; it would merely tend to prove that a certain group of companies in any certain year—

Trial Examiner Norwood: At one time.

Mr. Zimmerman: No, sir. Only a small group in a certain area in a given year instead of maintaining their independent freight department bought service from this organization. It doesn't tend to show at all what the industry as a whole did.

Mr. Paulson: It is an integral part of that showing.

Trial Examiner Norwood: It is a part of the industry and shows a character of the service which they bought, as testified to by former witnesses.

I shall overrule the objection and receive the exhibits as marked.

(COM. EX. 2849, 3047-A, and 3047-B, were offered and received in evidence.)

18859 Mr. Wooden: I have here Commission's Exhibits 585-F and G, which Mr. Leisure wished to see in his consideration of the offer of Exhibit 585-E 18860 (handing documents to Mr. Leisure).

Trial Examiner Norwood: Any objection to the proffer?

Mr. Leisure: Your Honor, this letter of transmittal, 585-E, refers to a letter dated March 6, 1934, and states that, "I am enclosing herewith a copy of the letter," which is the one dated March 6, 1934, being Exhibit 585-F and G.

At the time that exhibit was offered we made objections and pointed out to Your Honor that this was during the code period and had to do with a plan that was being talked of at that time for sharing available business and this discussion was pursuant to a code provision and we pointed out at that time that it could not have any bearing on this case for the reason that nothing ever came of it, and the discussion was under the terms of the code, and for the same reasons we object to this letter of transmittal as incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: Any further objection?

Mr. Leisure: Being part of the code material, and not proving or tending to prove any issues in this case.

Trial Examiner Norwood: I think that the complaint makes an issue there with regard to what was pro-
18861 posed under the code and what it alleges to have been brought about by other means.

Mr. Wooden: I might say, Your Honor, that in addition there are certain aspects of this rated capacity that were not confined to the code period, but antedated it and post-dated it as well.

Mr. Zimmerman: Nothing to add; thank you.

Trial Examiner Norwood: The objection is overruled.

(COM. EX. 585-E, was offered and received in evidence.)

JOHN P. SIMPSON was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

18862 *Direct Examination by Mr. Wooden.*

Q. Mr. Simpson, I am showing you Commission's Exhibit 1110-G, and calling your attention to page 63 of that exhibit, such exhibit being entitled "Iowa Rate Book No. 2," and I will ask you to state what is the rate shown therein from Kansas City, Mo., to Winthrop, Iowa, and on what date it was effective as there shown (handing document to witness)?

A. From Kansas City, Mo., to Winthrop, Iowa, this book, effective October 6, 1934, shows a rate of 13½ cents per hundred pounds (referring to data).

Q. Have you checked the rates between those two points, with the official published railroad tariffs on file at the Interstate Commerce Commission?

A. I have, sir—I find—

Q. What did you find the rate to be between those points in the official published tariffs as of the same date?

A. On October 6, 1934, the lowest rate I could find in any tariff on file with the Interstate Commerce Commission, was 16 cents a hundred pounds.

18863 That is published in Western Trunk Line Tariff No. 132-H, Agent L. E. Kipp's I. C. C. A-2179, page 332.

Mr. Leisure: What are you reading from?

The Witness: An exhibit that I compiled.

Mr. Leisure: May we have it marked, Your Honor?

Mr. Wooden: That is all right.

Trial Examiner Norwood: What is the exhibit—the questioned exhibit—3047; is that right?

Mr. Wooden: Yes.

Mr. Withrow: 3048.

Trial Examiner Norwood: Mark it a Commission's exhibit.

Mr. Wooden: This can be marked for identification.

(The document referred to was thereupon marked for identification as Commission's Exhibit 3048-A, 3048-B, 3048-C, 3048-D, and 3048-E.)

Trial Examiner Norwood: The paper which the witness is using in his testimony is marked Commission's Exhibit 3048-A to E, for identification.

Mr. Leisure: The witness is not refreshing his memory at all, he is reading from an exhibit, and I would like for the record to show that, and before he reads further I ask it either be offered or accepted or that the witness not read from exhibits not in evidence.

Mr. Wooden: He is not reading from it, if Your
18864 Honor please, as I understand it.

Mr. Leisure: I don't know why we have to go through that foolishness. All we have to do is look at him and see he is reading from it.

Mr. Wooden: I am not going to offer it, Your Honor. I have no objections for Respondents examining it for cross-examination or any other legitimate purpose.

Trial Examiner Norwood: What is this, calculations and tabulations?

Mr. Wooden: No, Your Honor—you mean the papers?

Trial Examiner Norwood: Yes.

Mr. Wooden: It purports to be a tabulation of certain rates between certain points as of certain times and a comparison.

Trial Examiner Norwood: Are they official rate information?

Mr. Wooden: No; made up for the purpose of having this witness guide his testimony according to the things which he has checked and personally inspected in the official tariffs on file.

Trial Examiner Norwood: Is he able to answer these questions without reference to these calculations?

Mr. Wooden: I wouldn't think so, Your Honor. There are quite a number of rates and points of destination, and so on, involved.

18865 Trial Examiner Norwood: Did you make them up yourself (addressing the witness)?

The Witness: I did, sir.

By Mr. Wooden:

Q. Did you finish your answer, Mr. Simpson?

A. Yes, sir.

I might state, before closing that point, that the rate shown—

Mr. Leisure: Just a moment, please.

If Your Honor pleases, object to the witness reading from exhibits that are not in evidence.

Trial Examiner Norwood: Objection overruled.

A. The rate shown as initial rate data was not found on the date alleged nor at any time between that date and the date of correction sheet.

I should state that the rate of 16 cents which was found in force on October 6, 1936, was subject to an added emergency charge of 1 cent a hundred pounds as shown in the tariff of emergency charges, Agent Kipp's, known as A-2245, 2277, 2572, or 2611, which were effective between January 4, 1932, and September 30, 1933, and between August 18, 1935, and December 31, 1936.

These dates and I. C. C. numbers will not be repeated but may be referred to hereafter.

By Mr. Wooden:

18866 Q. I am showing you Exhibit 3015-DD, a correction sheet of the Institute dated April 28, 1936. Do you find, there, a rate between Kansas City and Winthrop, Iowa?

A. Yes.

Q. What is it?

A. Correction sheet No. 30 to Iowa Rate Book 2, issued April 28, 1936, shows that effective at once the rate from Kansas City to Winthrop was changed to 16 cents; presumably changed; it doesn't so state, but it shows a rate of 16 cents.

Q. Did that rate of 16 cents become effective according to the official railroad tariffs on file with the Interstate Commerce Commission, and, if so, when did it become effective?

A. That rate of 16 cents was in force on October 6, 1934, and increased under the tariff of emergency charges to which I have heretofore alluded and may have been in force prior thereto. I made no check back of that.

It remained in force except as modified by the tariff of emergency charges through and including the date of April 28, 1936.

Q. Assuming that the only rates published by the Institute between those two points, Kansas City and Winthrop, Iowa, for the period between the two dates named, were those which I have called to your attention, state whether or not the rate so published was correct, and if not correct, by what amount it was incorrect and over what

18867 approximate length of time it was incorrect?

A. For a period of approximately 18 months the rate published by the Institute, I believe you call it, was 2½ cents lower than that published in the tariffs of the railroads and on which the carriers based their charges.

Q. Now, I am showing you Exhibit 1110-N, the Minnesota Rate Book No. 2 of the Institute, and will ask you if you find there a rate published between Des Moines, Iowa, and Brevater Junction, Minn.

A. This book, which is shown in Minnesota Rate Book No. 2, effective November 12, 1934, shows that the rate from Des Moines, Iowa, to Brevator,—B-r-e-v-a-t-o-r,—Junction, Minn., was 26 cents per hundred pounds.

Q. Have you checked the rate between Des Moines,

Iowa, and Brevator Junction, Minn., with the official published railroad tariffs on file at the Interstate Commerce Commission?

A. I did, sir.

Q. What did you find the rate to be in those official published tariffs as of the same date?

A. On November 12, 1934, the rate then shown in the tariff lawfully on file with the Interstate Commerce Commission which I examined was 23½ cents, which was shown in tariff—strike out "was shown in tariff"—which was a Cloquet, Minn., combination, Western Trunk Line Tariff No. 132-H, Kipp's I. C. C. No. A-2179, page 222, index No. 6689, to Cloquet 4 cents beyond Duluth and Northwestern, I. C. C. No. 63, page 20.

18868 Q. (indicating) Showing you Commission's Exhibit 3022-II; do you find a rate published there in that correction sheet of the Institute between those same two points, and, if so, what was it, and as of what date?

A. The correction sheet No. 32 to Minnesota Rate Book No. 2, issued April 6, 1937, and effective at once, shows a rate from Des Moines, Iowa,—presumably from Des Moines,—to, or presumably to, Brevator Junction of 23½ cents.

Q. Did that rate become effective according to the official railroad tariffs on file with the Interstate Commerce Commission, and, if so, when?

A. The rate of 23½ cents from Des Moines to Brevator Junction was in force during the period November 12, 1934, to April 6, 1937, a period of approximately 29 months. During that 29 months the rate shown by the Institute was 2½ cents higher than that charged by the carriers.

Q. Now, do you find in that Minnesota rate book—what was that exhibit number?

A. No, 132, was it not?

Q. Commission's Exhibit 1110-N, wasn't it?

A. 1110-N; yes, sir.

Q. A rate published between Hannibal, Mo., and Brevator Junction, Minn., and, if so, what amount?

18869 A. Hannibal, Mo., and Brevator Junction (referring to data)—this tariff shows—this rate book, Exhibit 1110-N, shows that the rate from Hannibal, Mo., to Brevator Junction is 29½ cents per hundred pounds.

Q. As of what date?

A. As of November 12, 1934.

Q. Have you checked the rates between those two points with the official published railroad tariffs on file at the Interstate Commerce Commission?

A. I did, sir.

Q. What did you find the rate to be in those official tariffs as of the same date?

A. On November 12, 1934, I found a rate of 27 cents per 100 pounds.

Mr. Leisure: Twenty-seven, was that, Mr. Simpson?

The Witness: Yes, sir.

By Mr. Wooden:

Q. When did that 27-cent rate become effective, according to the official tariffs?

A. It was in force on November 12, 1934; I cannot say when it became effective.

Q. Assuming that the only rates published by the Institute between Hannibal and Brevator Junction—

A. You have only shown me the one.

Q. I beg your pardon; oh, yes.

18870 Do you have a correction sheet before you, Commission's Exhibit 3022, which contains a rate between Hannibal and Brevator Junction?

A. I have before me Commission's Exhibit 3022, a group of correction sheets to the Minnesota Rate Book No. 2.

Q. Is there an exhibit number on that sheet?

A. Yes, 3022.

Mr. MacIntyre: II.

The Witness: II, and it shows that the rate from Hannibal, Mo., to Brevator Junction, Minn., was 27½.

By Mr. Wooden:

Q. When did that become effective, according to the correction sheet?

A. So far as I could find—I beg your pardon—did you say Hannibal, Mo.?

Q. Yes.

A. That is 27 cents—not 27½.

The 27-cent rate was in force on November 12, 1934, and except as modified by the tariff emergency charges remained in force to and including April 6, 1937, a period of about 2½ years (referring to data).

Q. Do you find in Commission's Exhibit 1110-N a rate between Kansas City, Mo., and Brevator Junction, Minn.?

A. Before answering that question, Mr. Wooden, I don't know whether I answered the question about
18871 Des Moines to Brevator Junction in full or not. I answered that there was a rate of—

Q. Des Moines or Hannibal?

A. Des Moines—of 23½ cents in force, I should say modified at times by the tariff of emergency charges.

Q. All right.

A. Now, you asked about Kansas City?

Q. Kansas City to Brevator Junction.

A. Commission's Exhibit 1110-N, page 8, shows that the rate from Kansas City to Brevator Junction was 30½ cents.

Q. Have you checked the rates between those points with the official published railroad tariffs on file at the Interstate Commerce Commission?

A. I have, sir.

Q. What did you find the rates shown in the official published tariffs as of the same date to be?

A. I found that the rate shown in the tariffs under the Cloquet, Minn., combination to Brevator Junction, was 27½ cents, on November 12, 1934.

Q. Can you say when that rate became effective?

A. That rate was in force on that date. How much prior thereto I cannot say offhand.

Q. Assuming that the only rates published by the Institute between those two points last named were those which I have called to your attention.

A. Pardon me, Mr. Wooden; you only called one
18872 rate to my attention.

Q. I thought we had also the—you have the correction sheet, haven't you?

A. Yes, sir.

Q. Look at the correction sheet, Exhibit 3022, and see if there is a rate published there between Kansas City and Brevator Junction.

A. Commission's Exhibit 3022-II shows that issued April 6, 1937, and effective at once, correction sheet No. 2 to Minnesota rate book No. 2 shows a rate of 27½ cents per hundred pounds from Kansas City to Brevator Junction, Minn.

Q. Now, assuming that the only rate published by the Institute between Kansas City and Brevator Junction for the period between the two dates named were those that I

have called to your attention, state whether or not the rate published by the Institute was correct, and, if not, by what amount it was incorrect and over what approximate length of time it was incorrect?

A. The rate of 27½ cents per hundred pounds mentioned by me and modified by the tariff of emergency charges heretofore mentioned was in force during this period of 2½ years during which time the Institute showed a rate of 30½ cents or 3 cents in excess of the actual rate as I checked it.

Q. Now will you look at Exhibit 1110-N, the Minnesota Rate Book, and see if there is a rate published be-
18873 tween Kansas City, Mo. and Rush Lake, Minn.

A. Commission's Exhibit No. 1110-N, Minnesota Rate Book 2, issued November 12, 1934, and effective the same date, shows a rate of 32 cents from Kansas City to Rush Lake, Minn..

Q. Have you checked the rates between Kansas City, Mo., and Rush Lake, Minn., with the official published tariffs on file with the Interstate Commerce Commission?

A. I have, sir.

Q. What did you find the rate to be in those official tariffs?

A. I found that the rate from Kansas City, Mo., to Rush Lake, Minn., on November 12, 1934, was 29½ cents.

The tariff authority or the tariff naming rates to and from Taft, Minn., combination, being Agent Kipp's I.C.C. Nos. A-2179 and A-2538, index No. 9483, Duluth and Northeastern, I. C. C. No. 63, page 26, item 525, rate 5 cents for a distance of 14.3 miles as shown in their I.C.C. No. 58.

Q. Now, showing you Exhibit No. 3022, and, particularly, 3022-II, do you find a rate there between Kansas City, Mo., and Rush Lake, Minn.?

A. Yes, sir.

Q. What is it?

A. In Commission's Exhibit 3022-II, being correction sheet No. 32 to Minnesota Rate Book 2, shows a rate of 30 cents per hundred pounds from Kansas City to Rush Lake, Minn.

18874 Q. You gave the effective date of that, did you?

A. I am not sure I did.

Issued April 6, 1937, and shown as effective at once.

Q. Did the rate you have just given from the correction sheet become effective according to the official railroad tariffs on file at the Interstate Commerce Commission, and, if so, when did they become effective?

A. So far as I can find—that is the Kansas City rate?

Q. Yes.

A. So far as I can find, the rate of 30 cents never became effective from Kansas City to Rush Lake. It is possible it was effective over some route which I didn't discover. However, I did find a lower rate of 29½ cents in force throughout the period November 12, 1934, to April 6, 1937. That rate of 29½ cents and the rate of 30 cents, as shown by the Institute in its correction sheet, both being subject from time to time to the tariff of emergency charges.

The rate of 29½ cents which I have quoted as being in force throughout this period was the Taft combination, as heretofore described.

Q. Now, look at Exhibit 1110-N, the Minnesota Rate Book 2, and tell us if there is a rate between St. Louis, Mo., and Charlesville, Minn., and if so what is it?

A. Commission's Exhibit No. 1110-N, issued November 12, 1934, and effective November 12, 1934, shows
18875 a rate of 16 cents from St. Louis to Charlesville, Minn.

Q. Have you checked the rates between St. Louis and Charlesville, Minn., with the official published tariffs on file with the Interstate Commerce Commission?

A. Yes, sir.

Q. If so, what did you find the rate to be as of the same date?

A. The rate which I checked in force on November 12, 1934, from St. Louis, Mo., to Charlesville, Minn., was 26 cents per hundred pounds.

Q. Now, looking at Exhibit 3022, do you find any published rate there between St. Louis, Mo., and Charlesville, Minn.? If you find it, give us the sub-letter.

18876 Q. Referring to Commission's Exhibit 3022-SS, do you find there a rate between St. Louis, Mo., and Charlesville, Minn.?

A. This exhibit, being correction sheet No. 42, to Minnesota Rate Book No. 2, issued October 11, 1937, and shown as effective at once, names a rate of 26 cents from St. Louis to Charlesville, Minn.

Q. Did that rate become effective according to the official railroad tariffs on file at the Interstate Commerce Commission, and, if so, when?

A. That rate was in force throughout the entire period

of November 12, 1934, to October 11, 1937 (referring to data), a period of nearly 3 years.

It is possible that the rate of 16 cents shown in the regional rate book is a typographical error.

Q. Did the emergency charge have any bearing upon those rates?

A. The emergency charge modified that rate, the same as all other rates in this statement during that period.

And, Mr. Wooden, if I may, hereafter I will not mention the emergency charge because it applies on every rate in force during the period in this tabulation.

Mr. Wooden: All right.

By Mr. Wooden:

Q. Now, refer to Commission's Exhibit 1110-N, the Minnesota Rate Book No. 2, and see if there is a rate
18877 published between Louisville, Nebr., and Manchester, Minn., and, if so, what is it?

A. (Witness referring to data) Minnesota Rate Book No. 2 shows a rate of 17 cents from Louisville to Manchester.

Q. As of what date, did you say?

A. As of November 12, 1934.

Q. If you checked the rates between those points with the official published railroad tariffs on file at the Interstate Commerce Commission, what did you find the official published rate to be?

A. 14½ cents.

18878 Q. Now looking at Exhibit 3022-SS, do you find a rate between Louisville, Nebraska, and Manchester, Minnesota, for—

A. Yes, sir, 14½ cents.

Q. As of what date?

A. October 11, 1937, effective at once.

Q. Did that rate that you have just given become effective according to the official railroad tariffs on file with the Interstate Commerce Commission and, if so, when?

A. So far as I could find at the time of making the check the rate of 17½ cents was never enforced.

The rate of 14½ cents was enforced throughout this three-year period.

Q. Now will you look at Exhibit 1110-N, the Minnesota Rate Book No. 2—

Mr. Leisure: What was the source of that last?

The Witness: Western Trunk Line Tariff 132-H, Agent L. E. Kipp's, I. C. C. No. A-2179, page 296, index No. 10520 and supplement 50, index No. 16136.

By Mr. Wooden:

Q. Now will you look at Exhibit 1110-N, the Minnesota Rate Book 2 and tell us if there is a rate published there from Manitowoc, Wisconsin, to Manchester, Minnesota, and, if so, what it is.

A. Exhibit No. 1110-N was effective November 12, 1934, the rate from Manitowoc to Manchester, 14½ cents.

18879 Q. If you checked the rates between those two points with the official published railroad tariffs on file at the I. C. C., the rates to be in the official published tariffs as of the same date, what did you find?

A. I found the rate throughout the period November 12, 1934, to October 11, 1937, from Louisville, Nebraska, to Manchester, Minnesota—

Q. I am speaking of Manitowoc, now.

A. From Manitowoc, Wisconsin, the dates are the same, to Manchester, Minnesota, was 17½ cents—when I answered to Louisville I gave one tariff reference. That applied on both Louisville and Manitowoc for the opening date; that is, November 12, 1934.

During the period between November 12, 1934, and August 11, 1934, the tariff 132-H was cancelled by Western Trunk Line Tariff 132-I, Kipp's I. C. C. No. A-2538, page 176, index No. 10520 and page 201, index No. 16136.

There was no change in rate in the re-issue.

The rate from Manitowoc to Manchester was 17 cents.

18880 Q. (Indicating) I am now showing you, Mr. Simpson, Commission's Exhibit 1110-P, being the Institute's Missouri Rate Book No. 3.

Do you find in that any rate published between Mason City, Iowa, and Plainview, Mo., and, if so, what is it?

A. Exhibit 1110-P named a rate of 17 cents from Mason City to Plainview, Schuyler County, Mo.

Q. If you made any check of the rates between those two points with the official published railroad tariff on file at the Interstate Commerce Commission, state what you found the rate to be in those official tariffs as of the same date?

The Witness: Your Honor, I never have seen this

before, and did not know the county. I will take a second to verify that county reference.

Trial Examiner Norwood: Go ahead.

(Witness checks data.)

A. I found a rate in my previous check from Mason City to Plainview, Mo., of 14 cents in force on November 12, 1934. I do not know what county that station was located in, and cannot tell from my notes which road—let us see (consulting further data)—no, I cannot tell from my notes which road it is located on.

By Mr. Wooden:

Q. I am now showing you Commission's Exhibit 3024, the correction sheets for Missouri, and particularly 3024-Q, and will ask you what rate, if any, is shown there
18881 between Mason City, Iowa, and Plainview, Mo.?

A. Fourteen cents, on a sheet issued September 18, 1935, and effective at once (referring to data).

Q. Did that rate become effective according to the official railroad tariffs on file at the Interstate Commerce Commission, and, if so, when?

A. The rate of 14½ cents, according to my check, from Mason City, Iowa, to Plainview, Mo., was in force throughout the period January—let us see now—January 23, 1935, to and including September 18, 1935. The rate was 14 cents.

The tariff authority for that rate was L. E. Kipp's I. C. C. A-2179, item 65, the station Plainview is located between Worthington and Connellsville, Mo. Also referring to index No. 4146 and 4150, of I. C. C. A-2179, and to the Agent's I. C. C. A-2538, item 110, and index Nos. 4146 and 4150.

The Witness: The rate in the rate book was 17 cents on January 23, 1935, and 14 cents in the correction sheet.

By Mr. Wooden:

Q. You mentioned 14½ one time.

A. I meant 14.

Q. Was that an error?

18882 A. That was an error.

The rate in the tariff on both dates, and throughout the period, was 14 cents.

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. (Indicating) Now, I am showing you Commission's Exhibit 1110-Q, being the Institute's Nebraska Rate Book No. 2, effective February 5, 1935, and will ask you what rate, if any, is shown therein between Kansas City, Mo., and Rokeby, Neb.

A. (Referring to data) 25 cents, effective Febru-
18883 ary 5, 1935.

Q. If you checked the rate between those two points with the official published tariffs on file at the Interstate Commerce Commission, what did you find the rate to be in the official published tariffs of the same date?

A. 15 cents.

Q. Now showing you Exhibit 3025-C, a correction sheet of the Institute, what was the rate and date of effectiveness between Kansas City and Rokeby in Nebraska as there shown?

A. Correction sheet No. 3 to Nebraska Rate Book 2, issued March 22, 1935, and effective at once shows a rate of 15 cents from Kansas City to Rokeby.

Mr. Leisure: Is the correction sheet dated? You said it was effective at once.

The Witness: Dated March 22, 1935.

By Mr. Wooden:

Q. Effective at once?

A. Effective at once.

Q. Did that rate book become—rather, did that rate become effective according to the official railroad tariffs on file at the Interstate Commerce Commission, and, if so, when?

A. Western Trunk Line Tariff 133-H, Agent, L. E. Kipp's, I. C. C. No. A-2475, page 87 and index No. 2824, showed a rate of 15 cents per hundred pounds in force throughout the period January 1, 1935, to Septem-
18884 ber 18—no, February 5, 1935, to March 22, 1935.

Trial Examiner Norwood: That is the same as the book, isn't it?

The Witness: No, the book shows 25 cents in the original books and 15 cents in the correction sheet.

By Mr. Wooden:

Q. As I understand it, 15 cents was correct during that full period?

A. 15 cents was correct and it was caught in about 15 days. The error was corrected, in other words.

Q. Now looking at the Nebraska Rate Book, Exhibit 1110-Q, what is the rate there given between Linnwood, Iowa, and Rutland, Nebraska, and what is the date?

A. Effective February 5, 1935. This book shows a rate of 20 cents a hundred pounds.

Q. If you checked the rate between those two points with the official published tariffs on file with the Interstate Commerce Commission, what did you find the rate to be?

A. The lowest rate I could find on any route on that date between those points was 30 cents.

Q. Now looking at the Nebraska correction sheet, Exhibit No. 3025-C, what do you find the rate between Linnwood, Iowa and Rutland, Nebraska is, there?

A. 30 cents on sheet issued marked March 22, 1935, and effective at once.

18885 Q. Did that rate become effective according to the official tariffs on file and, if so, when?

A. For a period of 50 days the rate shown in the rate book was 10 cents lower than the lowest rate which I have been able to check.

That difference was, apparently, corrected by this correction sheet.

Mr. Leisure: Just a moment, Mr. Wooden.

I didn't get the citation.

The Witness: Oh, I beg your pardon. I think I did—Agent Kipp's 133-H?

Mr. Leisure: I didn't hear it.

The Witness: The authority for the 30-cent rate was—I did not give it to you—the Cramford, Neb., rate shown in Western Trunk Line Tariff 133-H, L. E. Kipp's I. C. C. No. A-2475, page 77 and index No. 2129-Q.

Also C. B. & Q. distance table, G. F. O. 9000-B, I. C. C. No. 17392, Index 8110.

The Cramford, Nebraska, rate was used under the—

Mr. Leisure: That is, Linnwood, Iowa, and Rutland, Nebraska, that you have been reading?

The Witness: Yes.

By Mr. Wooden:

Q. Now showing you, Mr. Simpson, Exhibit 1110-T, the Institute's New Mexico Rate Book No. 1, effective October 26, 1935, do you find a rate there between Laramie,

18886 Wyoming, and Hawks, New Mexico, and, if so, what was it?

A. Yes.

18887 Q. And if so, what was it?

A. (Referring to data) Forty-five cents—in a schedule, in a rate shown as effective October 26, 1935.

Q. If you checked the rates between those two points, with the official published tariffs on file at the I. C. C., what did you find the rate to be in those tariffs?

A. (Referring to data) I did not find any rate as low as 45 cents in force by—or I did not find the rate of 45 cents, I should say, in force on October 26, 1935, in any tariff.

Not finding that rate I made no note of the lowest rate I did find.

Q. (Indicating) Now, showing you Commission's Exhibit 3028, and particularly 3028-DD, what rate do you find between Laramie and Hawks?

A. Before answering your last question, I am going to revert back to my answer about the 45-cent rate, and state that I do not doubt that some tariff may possibly name that rate on that date, but I was unable to locate the rate.

However, on November 13, 1937, effective at once, correction sheet No. 27 on New Mexico Rate Book No. 1, shows a rate of 34 cents per hundred pounds, according to my—

Q. All right, did that rate become effective, and, if so, when, according to the official railroad tariffs on file?

A. I find that as early as February 20, 1937, there was named a rate of 34 cents in U. P. I. C. C. No. 4351,

18888 Tariff No. 3158-A, at page 5, index No. 44, assuming that San Rosa is the same as Santa Rosa, and applying the Santa Rosa under the intermediate clause.

Q. Is that the same rate which the correction sheet made effective on November 13, 1937?

A. That is the same rate as shown by the correction sheet 8 months later; at least, it is the same in the cents per hundred pounds. I cannot say how that is computed.

Q. Now, looking at that same freight rate book, Exhibit 1110, what is it, T—the New Mexico book?

A. 1110-T.

Q. Do you find a rate published there between Laramie, Wyo., and Turquoise, N. M., and, if so, what was it?

A. (Referring to data) 55½ cents.

Q. If you checked the official published railroad tariffs on file at the I. C. C. for rates between those two points, what did you find the rate to be?

A. I was unable to locate the rate of 55½ cents in any tariff which I examined naming rates between Laramie and Turquoise, as being in force on October 26, 1935.

Q. How complete was your examination for the purpose of ascertaining whether such a rate was—

A. It was necessarily incomplete, because of lack of time.

Q. Referring to the correction sheets for New Mexico, Commission's Exhibit 3028-DD, what rate do you
18889 find there between Laramie, Wyo., and Turquoise, N. M.?

A. (Referring to data) The correction sheet No. 27 issued November 13, 1937, effective at once, shows the rate of 45 cents.

Q. Did that rate become effective according to the official tariffs on file at the I. C. C., and, if so, when?

A. It actually became effective, according to the tariff which I examined, on February 20, 1937 (referring to data), and the authority is Union Pacific I. C. C. No. 4351, page 6, index No. 198.

Q. (Indicating) Now, referring to Commission's Exhibit 1110-V, North Dakota Rate Book No. 2 of the Institute, do you find therein a rate from Hanover, Mont., to Edgeley, N. D., and, if so, what is it?

A. (Referring to data) 33½ cents.

Q. If you made any check of the rates between those two points with the official published railroad tariffs on file at the I. C. C., state what the official published rate was as of the same date?

A. On that date I checked a rate of 33 cents, rather than 33½ cents, and the rate was in force by the C. M. St. P. & P., direct, from January 5, 1928, to November 22, 1937, which would include this period, 33 cents shown in Chicago & Milwaukee & Pacific I. C. C. B-5602, page 20, index 1222, from November—

18890 Do you want me to carry on that rate, Mr. Wooden?

Q. Yes, complete your answer.

A. The rate in force from November 23, 1937, to April 1, 1938, was, as shown in Supplement 27 to the same tariff, 34 cents.

From April 1, 1938, to and including April 27, 1938, 36 cents.

I did not make notes of the rate beyond that.

Q. (Indicating) Now, showing you Commission's Exhibit 3030, the correction sheets for North Dakota, and particularly 3030-BB, what rate do you find from Hanover to Edgeley, N. D.?

A. Thirty-six cents.

Q. If that rate became effective according to the official railroad tariffs on file at the I. C. C., when did it become effective?

A. This is issued April 27, 1938, and is shown as effective at once (referring to data).

Q. When did it become effective according to the I. C. C. published tariffs?

A. (Referring to date) April 1, 1938.

Q. Now, referring again to the freight rate book for North Dakota, the exhibit you have before you there, I believe—what is that?

A. The freight rate book?

Q. Yes, Commission's Exhibit 1110-V (indi-
18891 cating),—what rate do you find there between Trident, Mont., and Kloze, N. D., and what date?

A. Thirty-eight cents was shown as being in force on November 29, 1935.

Q. What rate did you find, if any, between those points published in the official tariffs of the railroads on file at the Interstate Commerce Commission?

A. On that date the rate was 35 cents, as shown in the tariffs on file with the Commission.

Q. Now, looking at the correction sheets, Exhibit 3030 for North Dakota, and particularly 3030-L, what rate do you find between Trident, Mont., and Kloze, N. D., and what date did it become effective?

A. (Referring to date) The rate is shown in a sheet issued December 2, 1936, effective at once, as 35 cents.

Q. Did that rate become effective according to the official tariffs on file at the Interstate Commerce Commission, and, if so, when?

A. I do not have a record of when it became effective, but it was in force on November 29, 1935, a little over a year previously, and remained in force throughout the period.

Q. A little over a year previously to what?

A. To the date of the correction sheet.

The authority for the Kloze rate is Northern Pacific tariff No. 3597-E, I. C. C. No. 8064, page 10, index 18892 1116 (referring to data).

Q. (Indicating) Showing you now Commission's Exhibit 1110-CC, being the Oklahoma Rate Book No. 2 of the Institute, effective January 31, 1934,—will you tell us what the rate there shown is between Marquette, Mo., and Porter, Okla?

A. (Referring to data) 12 1/2 cents effective—in force on January 31, 1934.

Trial Examiner Norwood: 12 1/2, was that?

The Witness: 12 1/2 cents; yes, sir.

By Mr. Wooden:

Q. Did you find a rate between those same points in the official published railroad tariffs on file at the I. C. C., as of the same time?

A. The earliest—

Q. And, if so, what was it?

A. (Referring to date) The rate in force on that date, according to the tariffs, was 21 1/2 cents, which is the lowest rate I was able to find.

Mr. Leisure: Do you have any authority?

The Witness: The authority (referring to data)—Southwestern Line Tariffs No. 128-E, Agent J. E. Johanson's I. C. C. No. 2323, page 48, index 6902.

I might state that Agent J. R. Peel succeeded J. E. Johanson, in that series, and it is possible that you may find it under that name.

18893 By Mr. Wooden:

Q. Now, calling your attention to Commission's Exhibit 3032, and particularly 3032-C, what rate between those same two points do you find there,—Marquette, Mo., and Porter, Okla.?

A. (Referring to data) 21 1/2 cents, a sheet issued February 28, 1934, and effective at once.

Trial Examiner Norwood: What was the amount?

The Witness: 2 1/2 cents.

By Mr. Wooden:

Q. Did that rate become effective according to the official tariffs on file at the I. C. C., and, if so, when?

A. That rate was in force in the tariff heretofore men-

tioned, until the effective date of the rate book, Institute rate book, and remained in force until corrected, a period—

Q. How long was that?

A. A period of about a month.

Q. Now, will you look at the Oklahoma Rate Book, Exhibit No.—

A. CC.

Q. CC.

A. Yes.

Q. And tell us what the rate there shown is between Dallas, Texas, and Vinita, Okla., and as of what date?

A. (Referring to data) Effective January 31, 1934, this book showed a rate of 11 1/2 cents from Dallas to Vinita.

Q. If you checked the rate between those same
18894 two points with the official published tariffs at the I. C. C., what did you find the rate to be as of the same date?

A. (Referring to data) Southwestern Lines Tariff No. 155-C, Agent J. E. Johanson's I. C. C. No. 2533, pages 29 and 46, indices 3760 and 9225, showed a rate of 17 1/2 cents from Dallas to Vinita on that date.

Q. Now, looking at the correction sheet for Oklahoma, Commission's Exhibit 3032-C, what rate between those same two points did you find there?

A. 17 1/2 cents.

Q. Did that rate become effective according to the official tariffs on file at the I. C. C., and, if so, when?

A. That rate was in force in a tariff heretofore mentioned, on the date shown as the effective date of the original rate book, and remained in force for the 30 days until such time as corrected by the correction sheets.

18895 Q. Approximately what length of time?

A. 28 days, to be exact.

Q. Now will you look at the rate book for Oklahoma, Exhibit 1110-CC, is that right?

A. Yes.

Q. And tell us what the rate there shown is between Dallas, Texas, and Wayside, Oklahoma, and the date.

A. 13 1/2 cents shown as being in force January 31, 1934.

Q. Did you find a rate at the official published tariffs between those points on file with the Interstate Commerce Commission?

A. The lowest rate—

Q. And, if so, what?

A. The lowest rate which could be found in force January 1, 1932, on any tariff on that route was 18 1/2 cents, Southwestern Line Tariff 155-C, J. E. Johannsen, I. C. C. 2535, page 30, index 4105.

Q. Now referring again to Exhibit 3032-C—is that the correction sheet?

A. 3032-C, yes.

Q. Do you find a rate there between Dallas and Wayside, Oklahoma?

A. Issued February 28, 1934, effective at once, this shows a rate of 18 1/2 cents.

Q. When, according to the official tariffs on file 18896 at the Interstate Commerce Commission, did that rate become effective.

A. That rate was in force on the date of January 31 that the Oklahoma rate book went into use and remained incorrectly named therein until February 28, 1934, a period of 28 days.

Q. Now I am showing you Exhibit 1110-O, being Mississippi Rate Book No. 3 of the Institute.

Will you tell us if there is a rate published there between Hannibal, Missouri, and Tyson, Mississippi, and, if so, what it is?

A. Twenty-five cents, shown as effective November 26, 1935.

This book, however, contains a note that all rates therein are subject to the emergency charges which I have described earlier in my testimony.

Q. If you checked the rate between those two points with the official published tariffs on file with the Interstate Commerce Commission, what did you find the rate to be in the official tariffs as of the same date?

A. 22 1/2 cents, named in Central Freight Association Tariff 449-C, Agent B. T. Jones' I. C. C. No. 2549, page 51, rate to Bruce, Miss.

Tyson is situated between Gums and Pittman; Jones' I.C.C. 2145, page 107, indices 52700 and 52702, and supplement 31, item 10-C.

Both Gums and Pittman take the Bruce, Miss., rate.

18897 Q. Now, showing you Exhibit 3023-G, being one of the Institute correction sheets, what rate do you find between those same two points and the date?

A. 22 1/2 cents, shown effective at once; issued February 26, 1936.

Q. Did that rate become effective according to the official tariff on file with the Interstate Commerce Commission, and, if so, when?

A. That rate of 22 1/2 cents was in force on November 26, 1935, in the tariffs, and remained in force except as adjusted by the emergency charges between November 26, 1935, and February 26, 1936, a period of two months.

Q. Can you say whether or not that rate was in effect prior to November 26, 1935, according to the tariffs?

A. My recollection is that it was.

Q. Can you say how long it was in effect prior to the date of the rate book rate?

A. My recollection is that every rate in this statement had been in force a number of years. I can't tell you the exact number, but I should say, offhand, at least five years prior to the dates shown except where I have indicated a change in the rate book—a change in the tariffs. There were very few during that period other than the changes under the emergency charges.

Q. Now, I show you Exhibit 1110-EE, the West
18898 Virginia rate book No. 4 of the Institute, effective July 20, 1935.

Can you tell us if there is a rate published therein between Kingsport, Tenn., and Coco, W. Va., and, if so, what it is?

A. 26.7 cents.

Q. If you made any check of the rates on file in the official published tariff between those same two points as of the same date, what did the official tariffs show?

A. That rate was correct on that date.

Q. Now, showing you Exhibit 3039, the correction sheets for West Virginia, and, particularly, 3039-FF, what rate do you find there between those same two points, and, the date?

A. This correction sheets shows—which was issued August 14, 1936, and effective at once, shows the rate of 21 cents per hundred pounds.

Q. Did that last named rate become effective according to the official tariffs on file with the Interstate Commerce Commission, and, if so, when?

A. The rate was established—let me give the authority, first, for the benefit of Counsel.

In Southern Freight Association Tariff 192-D, Agent F. L. Spieden's I. C. C. No. 1582, page 25, item 6; Richwood rate, trunk line, Tariff 45-D, W. S. Curletts' I. C. C. A-478, Supplement 7, page 3, effective January 25, 1936, or seven months prior to the date that it was picked
18899 up in the correction sheet.

Q. Now, will you look at the exhibit consisting of the rate book for West Virginia, Exhibit 1110-E and tell us what the rate between Kingsport, Tenn., and Bergoo, W. Va., is?

A. The rate is herein shown as 32 1/2 cents.

Q. If you checked the rates in the official published tariffs on file at the Interstate Commerce Commission between those same two points, what did you find it to be, as of the same date?

A. The lowest rate which we were able to find on the date of July 20, 1935, was 33 1/2 cents.

That was the rate to Durbin, 18 1/2 cents, Southern Freight Association 341-A, F. L. Spieden's I. C. C. No. 1626, page 169, and Trunk Line West Virginia Tariff No. 70, W. S. Curletts' I. C. C. A-340, page 160, index A-45 and A-55, Bergoo rate, page 329, rate basis 356, page 909, sixth class rate, 15 cents from Durbin, supplement 43.

Q. Now, looking at the correction sheet for West Virginia, Exhibit No. 3039, and particularly 3039-FF, what do you find there as to the rate between those same two points, Kingsport and Bergoo?

A. I don't find Bergoo.

Q. I should have referred you to 3039-GG. What do you find?

A. This correction sheet issued August 14, 1936, effective at once, shows the rate from Kingsport to be 21 cents.

18900 Q. If that rate became effective according to official tariffs on file at the I.C.C., when did it become effective?

A. The rate of 21 cents to Bergoo with the same tariff authority as given heretofore to Coco became effective on January 25, 1936, about 7 months prior to the date shown in the correction sheet.

Q. Now, will you look at the West Virginia rate book, Exhibit 1110-EE, and tell us what the rate shown there from Kingsport, Tenn., to Big John Mine, W. Va., is, and the date effective?

A. This rate book, effective July 20, 1935, shows a rate of 31½ cents.

Q. If you checked the rate between those same two points with the official tariffs on file at the Interstate Commerce Commission, what did you find it to be as of the same date?

18901 A. (Referring to data) We could not find the rate of 31½ cents in force over any route. We did find, however, a rate of 30½ cents, or one cent lower, in force until date of movement, which rate was named in Tariff No. 341-A, F. L. Speiden's I.C.C. No. 1626, 18½ cents, to Durbin, W. Va., and 12 cents beyond Durbin.

The Trunk Line West Virginia Tariff No. 70, Agent W. S. Curlett's I.C.C. No. A-340, page 160, index 805 and 810, Linan Mine rate, page 352, rate basis 42, on page 909, sixth class rate.

Q. Now, look at the correction sheets for West Virginia, Commission's Exhibit 3039-GG,—what rate between those same two points did you find there?

A. (Referring to data) Twenty-one cents. Now, on sheet issued effective August 14, 1936, and effective at once.

Q. According to the official railroad tariffs on file at the I.C.C., when did that rate become effective?

A. January 25, 1936, the same tariff authority, and the same error in date exactly as in the rate to Coco; that is, the same discrepancy as to date.

Q. How much time?

A. Seven months.

Q. Now, look at the freight rate book for West Virginia, Commission's Exhibit 1110-EE; is that right?

A. EE.

18902 Q. Tell us what the rate there from Kingsport, Tenn., to Blue Spring, W. Va., is, and the effective date?

A. (Referring to data) 32½ cents, effective July 20, 1935.

Q. What was the rate between those same two points as shown by the Official published tariffs on file and the I.C.C., as of the same date?

A. We checked the same rate and same authority to Blue Spring as to Bergoo.

(Referring to data) The rate is 33½ on July 20, 1935, over certain routes, and that was the lowest rate found by any tariff examined.

Q. Now, looking at the correction sheets for West Virginia, Commission's Exhibit 30—

A. 3039-GG.

Q. Do you find any rate there between those same two points, and, if so, what?

A. (Referring to data) We find a rate of 21 cents in a sheet issued August 14, 1936, effective at once.

Q. According to the records of the official tariffs on file with the Interstate Commerce Commission, when did that rate become effective?

A. (Referring to data) January 25, 1936, in the same tariff as that naming the rate of Coco.

Q. Now, look at the West Virginia Rate Book, Commission's Exhibit 1110-E, and tell us if there is any
18903 rate shown between Kingsport, Tenn., and Cheat Bridge, W. Va., and if so, what?

A. (Referring to data) 31½ cents.

Q. As of what date?

A. As of July 20, 1935.

Q. What did you find the rate between those two points to be as of the same date, as shown by the official published tariffs on file at the I.C.C.?

A. We verified that rate as of that date.

Q. Correct, in other words?

A. Yes.

Q. Now, looking at the correction sheets, Commission's Exhibit 3032, is it GG?

A. 3039-GG.

Q. 3039-GG, what is the rate between those same two points there shown?

A. (Referring to data) Twenty-one cents.

Q. When, according to the official tariffs on file with the I.C.C., did that rate become effective?

A. (Referring to data) That rate actually went in force on January 25, 1936, several months prior to the date announced by the Institute in this correction sheet.

Q. Now, will you take the rate book for West Virginia, and the correction sheets for West Virginia, and give us the same information regarding the rates between Kingsport, Tenn., and Deer Lick Mine, W. Va.?

18904 I am putting several questions in one, seeking to speed up a little.

A. (Referring to data) The rate book shows a rate of 31 cents effective July 20, 1935, Commission's Exhibit 1110-EE.

Referring to Commission's Exhibit 3039-GG, we find that a sheet issued August 14, 1936, and effective at once, there is named a rate of 21 cents; actually, however, that rate of 21 cents became effective several months earlier in the same tariff, and on the same date as the rate to Coco.

Q. Now, Mr. Simpson, I am showing you Commission's Exhibit 1110-W, the Ohio rate book of the Institute, and Commission's Exhibit 3031, being the correction sheets of the Institute for the Ohio Rate Book No. 3, which this is, and I will ask you to give us the same sort of information regarding the rates shown in those two exhibits, between Kosmosdale, Ky., and Bradner, Ohio, as compared with the rates between the same points as shown by the official tariffs on file with the I.C.C. (indicating).

Mr. Leisure: Is that Bradner, Ohio?

Mr. Wooden: Bradner, B-r-a-d-n-e-r.

The Witness: The Cement Institute, in their rate book, which is filed with the Commission as Exhibit 1110-W, carrying an effective date of November 27, 1936, named a rate of 11 cents.

(Referring to data) That correction is in that correction sheet No. 22, to that book, issued January 19, 18905 1938, effective at once, corrects that to 17 cents.

By Mr. Wooden:

Q. The exhibit number?

A. The Exhibit No. 3031-V, according to the tariffs on file with the Interstate Commerce Commission there was in force on November 27, 1936, a rate of 16 cents, rather than 11 cents, which rate remained in force until November 14, 1937, through and including November 14, 1937.

(Referring to data) On November 15, 1937, the rate of 17½ cents, which was shown by the correction sheets—

Q. Was it 17½?

A. Seventeen cents,—actually went into force, or two months prior to the dates shown by the change.

The authority for the 16-cent rate is Central Freight Association, tariff No. 399-G, B. T. Jones, I.C.C. 2422, page 5, Kosmosdale, at page 69, index 3872, rate 16, page 144, index 24, 500, rate 17 in force August 1, 1931.

The rate of 11 cents mentioned in the rat book was not found.

The rate of 17 cents was shown two months after it was actually in force.

Now, on November 15, 1937, the tariff authority is the same as that heretofore given, except that reference should also be made to Supplement 36, of I.C.C. 2422, page 2 thereof.

18906 Q. Now, referring to the same exhibits, the rate book for Ohio, and the correction sheets for Ohio, which you have before you, and taking the rates between Kosmosdale, Ky., and Unionport, Ohio, give us the facts regarding the dates and rates as shown by the Exhibits, and as compared with rates on file at the I.C.C.

A. (Referring to data) The rate book previously described showed the rate of 14 cents.

The rate on the date thereof, November 27, 1936, as checked by the tariff on file in the Interstate Commerce Commission, was 17 cents.

Effective January 19, 1938, Exhibit No. 3031-V, correction sheet No. 22 showed a correction of the rate to 18 cents. The 18-cent rate had really been in force two months earlier than that shown in the correction sheet. The tariff authority for the rates to Unionport are the same as those quoted to Bradner.

Q. How long had that 17-cent rate been in effect?

A. The 17-cent rate was in force from November 27, 1936, until November 14, 1937, approximately one year.

Now, it is possible that some tariff did name a 14-cent rate, but I was unable to find if there was any tariff.